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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 198.

E. M. PARSONS, PLAINTIFF IN ERROR,

vs.

THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED DECEMBER 6, 1894.

(15,745.)

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1 Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at a term thereof begun and held at the United States court-rooms, at St. Paul, Minnesota, on the first Monday in May, it being the seventh day of May, A. D. 1894, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn, and Honorable Amos M. Thayer, circuit judges.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Be it remembered that heretofore, to wit, on the sixteenth day of February, A. D. 1894, a transcript of record was filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, in pursuance to a writ of error directed to the circuit court of the United States for the southern district of Iowa, wherein E. M. Parsons was plaintiff in error and The Chicago and Northwestern Railway Company defendant in error, of which, by stipulation of the parties, filed in this cause on the twenty-first day of February, A. D. 1894, the following portions only of said transcript of record were printed, to wit:

2 Pleas in the circuit court of the United States of America for the southern district of Iowa, central division, at a term thereof began and holden at United States circuit court-
3 room, in the city of Des Moines, in the State of Iowa and district aforesaid, on the second Tuesday of October, it being the 17th day of October, A. D. 1893, before the Hon. Oliver P. Shiras, one of the judges of said court.

* * * * * * *

In the United States Circuit Court of the Southern District of Iowa, Central Division.

E. M. PARSONS, Plaintiff,
vs.
THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Defendant. } 3435. Law.

To the circuit court of the United States for the southern district of Iowa, central division:

The plaintiff, by leave of the court first had and obtained, files this amended and substituted petition, as follows:

The plaintiff dismisses his claim on the first count of his original petition and claims of the defendant, The Chicago and Northwestern Railway Company, upon the several causes of action in the several counts of this petition as hereinafter set forth, the aggregate sum of fifteen hundred and fifty dollars, as money justly due him from the said defendant, with a reasonable attorney's fee, and for the cause of action avers as a substitute for the 5 and 7 counts:

That the defendant is a body corporate, organized and existing under the laws of the State of Illinois, and a citizen of the said State, and doing business in the State of Iowa, as hereinafter set forth, as a common carrier of freight and passengers, and owns and operates, and did own and operate at the date hereinafter set forth, as such common carrier, a certain line of railroad from the city of Chicago, in the State of Illinois, to Missouri Valley and Council Bluffs, in the State of Iowa, and at the same time, the said defendant owned the majority of the stock and by the same general officers and board of directors controlled and operated the Fremont, Elkhorn & Missouri Valley railroad and the Sious City & Pacific railroad, which roads connected with the Chicago and Northwestern railway at Missouri Valley and extended westward to points in the State of Nebraska.

Plaintiff avers that the respective distances from the several points in Nebraska and Iowa to the city of Chicago, over the said roads, are and were as follows, to wit:

3½

From Blair, Nebraska, to Chicago	480 miles
" Kennard, Nebraska, to Chicago	487 miles
" Missouri Valley, Iowa, to Chicago	467 miles
" Dennison, Iowa, to Chicago	423 miles
" Maple River, " " "	398 miles
" Carroll, " " "	395 miles
" Glidden, " " "	388 miles
" Scranton, " " "	378 miles

The plaintiff avers that during the months of February, A. D. 1888, — had on hands at Carroll, in the State of Iowa, large quantities of corn and oats for shipment to such points east beyond the State of Iowa as the markets and the rates of freight charges might determine would be most profitable to him as a dealer and shipper of grain; and that during said months there had accumulated on the line of defendant's road in the State of Iowa, large quantities of corn and oats for shipment, that the defendant failed, refused and neglected to furnish cars to ship for the alleged reason that it was unable to supply sufficient cars therefor.

Plaintiff further shows and avers that by the appointment and authority of the president of the defendant's road, who was also the president at the same time, of the Fremont, Elkhorn & Missouri Valley and of the Sioux City and Pacific Railroad Companies, one K. C. Morehouse was appointed to and held the position and exercised the authority of general freight agent of said two last-named companies; and that in the months of January and February, A. D. 1888, a brother of the said K. C. Morehouse was interested in and was a copartner with the owners of large quantities of grain at various points in the State of Nebraska, upon the line of the said Fremont, Elkhorn & Missouri Valley road.

Plaintiff avers that prior to the 30th day of December, 1887, the freight upon corn and oats shipped from points in Nebraska over

the line of said several roads to Turner, or Rochelle, or Chicago, Illinois, or to points east of Chicago, had uniformly been higher than from points in Iowa on the Chicago and Northwestern railroad, by reason of the greater distance and the greater cost of service; but that on the said 30th day of December, 1887, the said defendant, combining together with the said Morehouse, who was in fact, under the control and direction of defendant, for the purpose of giving an unlawful preference to the shippers of corn and oats in Nebraska, and to unlawfully discriminate against this plaintiff and other shippers of corn and oats in Iowa, did put in force from points in the State of Nebraska, a certain freight tariff upon corn and oats in words and figures, to wit:

4 C. & N. W. G. F. D. No. 2927, superseding G. F. D. No. 2724, F., E. & M. V. and S. C. & P. G. F. D. 949, and G. F. D. No. 859 of 1887.

Chicago and Northwestern railway, Fremont, Elkhorn & Missouri Valley, and Sioux City and Pacific railway.

Joint Tariff on Corn and Oats in Car-loads, Taking Effect December 30, 1887, *to Rochelle, Ill., when Destined to New York, Boston, Philadelphia, Baltimore.*

From—	Per 100 lbs.	From—	Per 100 lbs.
Blair, Neb	11	Hastings, Neb	16
Kennard, Neb	11	Nickerson, Neb	13
Arlington, Neb	12	Hooper, Neb	13
Fremont, Neb	13	Scribner, Neb	13
Cedar Bluffs, Neb	13	Snyder, Neb	13
Colon, Neb	13	Dodge, Neb	13
Wahoo, Neb	13	Howells, Neb	13
Swedenburg, Neb	13	Clarkson, Neb	13
Cresco, Neb	13	Leigh, Neb	14
Davy, Neb	13	Creston, Neb	15
Little Salt, Neb	13	Brookfield, Neb	15
Lincoln, Neb	13	Cornlea, Neb	15
Morse, Neb	13	Lindsay, Neb	15
Linwood, Neb	13	Newman's Grove, Neb	15½
Abie, Neb	13	Bradish, Neb	16
Skull Creek, Neb	13	Albion, Neb	16
Brainard, Neb	14	Loran, Neb	16
102 Dwight, Neb	14	Petersburg, Neb	16
Bee, Neb	14	Elgin, Neb	16
Seward, Neb	14	Crowell, Neb	13
Goner, Neb	14	West Point	13
Beaver Crossing	15	Beemer, Neb	15
Hunkins, Neb	16	Wisner, Neb	14
Exeter, Neb	16	Pilger, Neb	14

Buxton, Neb	16	Stanton, Neb	14½
Geneva, Neb	16	Norfolk, Neb	15
Octavia, Neb	16	Hader, Neb	15
David City, Neb	16	Pierce, Neb	15
Millerton, Neb	16	Foster, Neb	15
Surprise, Neb	14	Plainview, Neb	15½
Poston, Neb	15	Creighton, Neb	16
Thayer, Neb	15	Battle Creek, Neb	15
Houston, Neb	16	Meadow Grove, Neb	15½

5 From—	Per 100 lbs.	From—	Per 100 lbs.
York, Neb	16	Burnett, Neb	15½
Charleston, Neb	16	Oakdale, Neb	16
Henderson, Neb	16	Neliegh, Neb	16
Stockham, Neb	16	Clearwater, Neb	17
Eldon, Neb	16	Ewing, Neb	18
Harvard, Neb	16	Inman, Neb	18
Emmet, Neb	19	O'Neill, Neb	19
Atkinson, Neb	20	Bassett, Neb	21
Stuart, Neb	20	Long Pine, Neb	22
Newport, Neb	21	Ainsworth, Neb	23
Inland, Neb	16		

Prepaid. Waybill through to Rochelle, Ill., via Missouri Valley, at rates given above. For rates from Rochelle to Baltimore, Philadelphia, New York, and Boston, see C. & N. W. G. F. D. No. 2604, November 25, 1887, amendments or subsequent issues.

H. R. McCULLOUGH,
G. F. A., C. & N. W. R.

K. C. MOREHOUSE,
G. F. A., S. C. & P. and F., E. & M. V. R's.

Plaintiff avers that said freight tariff was never printed in type and was never circulated or published at any of the stations on defendant's road in the State of Iowa, and no copy thereof was ever filed with the Interstate Commerce Commission as required by law, and the existence of the same was concealed from the knowledge of plaintiff and of shippers in the State of Iowa upon the line of defendant's road, and the benefits and advantages of the rates specified in such tariff were denied to plaintiff and shippers on the line of defendant's road in the State of Iowa.

Plaintiff avers that said special tariff remained in force at the several stations named therein upon the line of the Fremont, Elkhorn and Missouri Valley railroad in the State of Nebraska from December 30, 1887, up to the 1st of February, 1888, and large quantities of corn and oats were shipped during said time, upon and over the several roads aforesaid, to Turner and Rochelle, and thence to Chicago, Ill., at the rates therein specified, to wit: the sum of 11 cents per hundred pounds from the stations of Blair and Kennard, Neb.

Plaintiff avers that between the 30th day of December, A. D.

1887, and the 1st day of February, 1888, and at the several dates named in the Schedule- No. 5 & 8 attached to original petition and made a part of this petition, plaintiff had for shipment at
6 Carroll, Iowa, aforesaid, the number of pounds of corn and oats in said schedule- specified, and plaintiff was prevented and deprived, by reason of the matters herein alleged, of the right to ship the same upon the terms and at the rate given, as aforesaid, to the shippers in the State of Nebraska; and plaintiff then and there was compelled to ship and did ship said corn and oats on and over the road of the defendant from said station of Carroll to Chicago, Ill., and defendant then and there demanded and received for said service the sum of 19 cents per hundred pounds for the transportation of said corn and oats, a distance of only 395 miles, the same being a less distance, and for a like — contemporaneous service over the same line in the same direction, under substantially similar circumstances, as the transportation of corn and oats, as aforesaid, from Blair and Kennard and other points in Nebraska to Chicago, Ill.

Plaintiff avers that the fixing of said points of Turner and Rochelle as the pretended terminus of the shipment of corn and oats under said special tariff of December 30, 1887, was a mere device to evade the law. That Turner and Rochelle were not grain markets and had no elevators or facilities for handling grain, and said grain was intended to be, and was, in fact, transported by defendant to Chicago, Ill., and was there sold on the market or delivered to connecting roads for eastern seaboard points.

Plaintiff avers that the charges so made, demended, recieved and collected from plaintiff, as aforesaid, were unlawful, unreasonable, and unjust and contrary to the provisions of an act of Congress entitled "An act to regulate commerce," approved February 4, 1887, in that an unlawful preference and discrimination was practiced by defendant in favor of shippers of grain in the State of Nebraska and against this plaintiff, a shipper of grain in the State of Iowa, and in that defendant charged, demanded and received a greater compensation for a short than for a longer haul in the same direction, over the same line, the shorter being included in the longer haul, and being for a like and contemporaneous service in the transportation of a like traffic under substantially similar circumstances.

Plaintiff avers that the price and value of corn and oats at the dates of said shipments was at Chicago the price at New York and other seaboard points, less the freight, and the price at Carroll in Iowa, was the Chicago price, less the freight, and that plaintiff was damaged by reason of the premises, in a sum equal to the difference in the price charged and received by the defendant and the rate given from Blair and Kennard, Neb., to wit, the sum of 8 cents per hundred pounds upon 74,520 — oats and 113,640 pounds of corn and oats to wit, the sum of 950.52 dollars, for which sum he
7 asks judgment on this count of his petition, with interest at six per cent. per annum from February 1st, 1888.

And for substitute for the second count of the original petition, plaintiff avers:

That the defendant is a body corporate, organized and existing under the laws of the State of Illinois, and a citizen of the said State, and doing business in the State of Iowa, as hereinafter set forth, as a common carrier of freight and passengers, and owns and operates, and did own and operate at the dates hereinafter set forth, as such common carrier, a certain line of railroad from the city of Chicago, in the State of Illinois, to Missouri Valley and Council Bluffs, in the State of Iowa, and at the same time, the said defendant owned the majority of the stock and by the same general officers and board of directors controlled and operated the Fremont, Elkhorn and Missouri Valley railroad and the Sioux City and Pacific railroad, which roads connected with the Chicago and Northwestern railway at Missouri Valley and extended westward to points in the State of Nebraska.

Plaintiff avers that the respective distances from the several points in Nebraska and Iowa to the city of Chicago, over the said roads, are and were as follows, to wit:

From	Blair, Neb., to Chicago	480 miles
"	Kennard, Neb., to "	487 miles
"	Missouri Valley, Iowa, to Chicago	467 miles
"	Dennison, Iowa, to Chicago	423 miles
"	Maple River, " " "	398 miles
"	Carroll, " " "	395 miles
"	Glidden, " " "	388 miles
"	Scranton, " " "	378 miles

And plaintiff avers that during the months of January and February, A. D. 1888, — had on hands at Correctionville, in the State of Iowa, large quantities of corn and oats for shipment to such points east beyond the State of Iowa as the markets and the rates of freight charges might determine would be the most profitable to him as a dealer and shipper of grain; and that during said months there had accumulated on the line of defendant's road in the State of Iowa, large quantities of corn and oats for shipment, that the defendant failed, refused and neglected to furnish cars to ship, for the alleged reason that it was unable to supply sufficient cars therefor.

Plaintiff further shows and avers that by the appointment and authority of the president of the defendant's road, who was also
8 the president, at the same time, of the Fremont, Elkhorn & Missouri Valley and of the Sioux City & Pacific Railroad Companies, one K. C. Morehouse was appointed to and held the position and exercised the authority of general freight agent of said two last-named companies; and that in the months of January and February, A. D. 1888, a brother of the said K. C. Morehouse was interested in and was a copartner with the owners of large quantities of grain at various points in the State of Nebraska, upon the line of the said Fremont, Elkhorn & Missouri Valley road.

Plaintiff avers that prior to the 30th day of December, 1887, the freight upon corn and oats shipped from points in Nebraska over the line of said several roads to Turner, or Rochelle or Chicago, Ill., or to points east of Chicago, had uniformily been higher than from

points in Iowa on the Chicago and Northwestern railroad, by reason of the greater distance and the greater cost of service; but that on the said 30th day of December, 1887, the said defendant, combining together with the said Morehouse, who was, in fact, under the control and direction of defendant for the purpose of giving an unlawful preference to the shippers of corn and oats in Nebraska, and to unlawfully discriminate against this plaintiff and other shippers of corn and oats in Iowa, did put in force from points in the State of Nebraska a certain freight tariff upon corn and oats, in words and figures, to wit:

C. & N. W. G. F. D. No. 2927, superseding G. F. D. No. 2724, F., E. & M. V. and S. C. & P. G. F. D. 949, and G. F. D. No. 859 of 1887.

Chicago and Northwestern railway, Fremont, Elkhorn and Missouri Valley, and Sioux City and Pacific railway.

Joint Tariff on Corn and Oats in Car-loads, Taking Effect December December 30*th*, 1887, *to Rochelle, Ill., when Destined to New York, Boston, Philadelphia, Baltimore.*

From—	Per 100 lbs.	From—	Per 100 lbs.
Blair, Neb	11	Hastings, Neb	16
Kennard, Neb	11	Nickerson, Neb	13
Arlington, Neb	12	Hooper, Neb	13
Fremont, Neb	13	Scribner, Neb	13
Cedar Bluffs	13	Snyder, Neb	13
Colon, Neb	13	Dodge, Neb	13
Wahoo, Neb	13	Howells, Neb	13
Swedensburg, Neb	13	Clarkson, Neb	13

9 From—	Per 100 lbs.	From—	Per 100 lbs.
Cresco, Neb	13	Leigh, Neb	14
Davy, Neb	13	Creston, Neb	15
Little Salt, Neb	13	Brookfield, Neb	15
Lincoln, Neb	13	Cornlea, Neb	15
Morse, Neb	13	Lindsay, Neb	15
Linwood, Neb	13	Newman's Grove, Neb	15½
Abbie, Neb	13	Bradish, Neb	16
Skull Creek, Neb	13	Albion, Neb	16
Brainard, Neb	14	Loran, Neb	16
102 Dwight, Neb	14	Petersburgh, Neb	16
Bee, Neb	14	Elgin, Neb	16
Seward, Neb	14	Crowell, Neb	13
Goner, Neb	14	West Point, Neb	13
Beaver Crossing	15	Beemer, Neb	15
Hunkins, Neb	16	Wisner, Neb	14
Exeter, Neb	16	Pilger, Neb	14
Buxton, Neb	16	Stanton, Neb	14½
Geneva, Neb	16	Norfolk, Neb	15
Octavia, Neb	16	Hadar, Neb	15

David City, Neb.	16	Pierce, Neb.	15
Millerton, Neb.	16	Foster, Neb.	15
Surprise, Neb.	14	Plainview, Neb.	15½
Poston, Neb.	15	Creighton, Neb.	16
Thayer, Neb.	15	Battle Creek, Neb.	15
Houston, Neb.	16	Meadow Grove, Neb.	15½
York, Neb.	16	Burnett, Neb.	15½

From—	Per 100 lbs.	From—	Per 100 lbs.
Charleston, Neb.	16	Oakdale, Neb.	16
Henderson, Neb.	16	Neliegh, Neb.	16
Stockham, Neb.	16	Clearwater, Neb.	17
Eldon, Neb.	16	Ewing, Neb.	18
Harvard, Neb.	16	Inman, Neb.	18
Emmet, Neb.	19	O'Neill, Neb.	19
Atkinson, Neb.	20	Bassett, Neb.	21
Stuart, Neb.	20	Long Pine, Neb.	22
Newport, Neb.	21	Ainsworth, Neb.	23
Inland, Neb.	16		

Prepaid. Waybill through to Rochelle, Ill., via Missouri Valley, at the rates given above. For rates from Rochelle to Baltimore, Philadelphia, New York and Boston, see C. & N. W. G. F. D. No. 2604, November 25, 1887, amendments or subsequent issues.

H. R. McCULLOUGH,
G. F. A., C. & N. W. R.

K. C. MOREHOUSE,
G. F. A., S. C. & P. and F., E. & M. V. R's.

10 Plaintiff avers that said freight tariff was never printed in type and was never circulated or published at any of the stations on defendant's road in the State of Iowa, and no copy thereof was ever filed with the Interstate Commerce Commission as required by law, and the existence of the same was concealed from the knowledge of plaintiff and of shippers in the State of Iowa upon the line of defendant's road, and the benefits and advantages of the rates specified in such tariff were denied to plaintiff and shippers on the line of defendant's road in the State of Iowa.

Plaintiff avers that said special tariff remained in force at the several stations named therein upon the line of the Fremont, Elkhorn and Missouri Valley railroad in the State of Nebraska from December 30th, 1887, up to the 1st of February, 1888, and large quantities of corn and oats were shipped during said time upon and over the several roads aforesaid, to Turner and Rochelle, and thence to Chicago, Ill., at the rates therein specified, to wit: the sum of 11 cents per 100 pounds from the stations of Blair and Kennard, Neb.

Plaintiff avers that between the 30th day of December, A. D. 1887, and the first day of February, A. D. 1888, and at the several dates named in the Schedule No. 2 attached to original petition and made a part of this petition, plaintiff had for shipment at Correctionville, Iowa, aforesaid, the number of pounds of corn and oats in said

schedule specified, and plaintiff was prevented and deprived by reason of the matters herein alleged, of the right to ship the same upon the terms and at the rate given, as aforesaid, to the shippers in the State of Nebraska; and plaintiff then and there was compelled to ship and did ship said corn and oats on and over the road of defendant from said station of Correctionville to Chicago, Ill., and defendant then and there demanded and received for said service the sum of 21 cents per 100 pounds for the transportation of said corn and oats a distance of only 475 miles, the same being a less distance, and for a like — contemporaneous service over the same line in the same direction, under substantially similar circumstances, as the transportation of corn and oats, as aforesaid, from Blair and Kennard and other points in Nebraska to Chicago, Ill.

Plaintiff avers that the fixing of said points of Turner and Rochelle as the pretended terminus of the shipment of corn and oats under said special tariff of December 30, 1887, was a mere device to evade the law. That Turner and Rochelle were not grain markets and had no elevators or facilities for handling grain, and said grain was intended to be, and was, in fact, transported by defendant to
11 Chicago, Ill., and were then sold on the market or delivered to connecting roads for eastern seaboard points.

Plaintiff avers that the charges so made, demanded, recieved and collected from plaintiff as aforesaid, were unlawful, unreasonable and unjust and contrary to the provisions of an act of Congress entitled "An act to regulate commerce," approved February 4, 1887, in that an unlawful preference and discrimination was practiced by defendant in favor of shippers of grain in the State of Nebraska and against this plaintiff, a shipper of grain in the State of Iowa, and in that defendant charged, demanded and recieved a greater compensation for a short than for a longer haul in the same direction, over the same line, the shorter being included in the longer haul, and being for a like and contemporaneous service in the transportation of a like traffic under substantially similar circumstances.

Plaintiff avers that the price and value of corn and oats at the dates of said shipment was at Chicago the price at New York and other seaboard points, less the freight, and the price at — in Iowa, was the Chicago price, less the freight, and that plaintiff was damaged by reason of the premises, in a sum equal to the difference in the price charged and received by the defendant and the rate given from Kennard and Blair, Neb., to wit, the sum of 10 cents per hundred pounds upon 241,710 pounds of corn and oats, to wit, the sum of 241.71 dollars, for which sum he asks judgement on this count of his petition, with 6% interest per annum from Feb'y 1st, 1888.

And for substitute for 3rd count of original petition, plaintiff avers:

That the defendant is a body corporate, organized and existing under the laws of the State of Illinois, and a citizen of the said State, and doing business in the State of Iowa, as hereinafter set forth, as a common carrier of freight and passengers, and owns and operates, and did own and operate at the dates hereinafter set forth as such common carrier, a certain line of railroad from the city of Chicago,

in the State of Illinois, to Missouri Valley and Council Bluffs, in the State of Iowa, and at the same time the said defendant owned the majority of the stock and by the same general officers and board of directors controlled and operated the Fremont, Elkhorn & Missouri Valley railroad and the Sioux City and Pacific railway, which roads connected with the Chicago & Northwestern railroad at Missouri Valley and extended westward to points in the State of Nebraska.

12 Plaintiff avers that the respective distances from the several points in Nebraska and Iowa to the city of Chicago, over the said road, are and were as follows, to wit:

From	Blair, Neb., to Chicago	480 miles
"	Kennard, Neb., to Chicago	487 miles
"	Missouri Valley, Iowa, to Chicago	467 miles
From	Dennison, Iowa, to Chicago	423 miles
"	Maple River, Iowa, to Chicago	398 miles
"	Carroll, " " "	395 miles
"	Glidden, " " "	388 miles
"	Scranton, " " "	378 miles
	Mapleton.	

And plaintiff avers that during the months of January and February, A. D. 1888, — had on hands at Mapleton, in the State of Iowa, large quantities of corn and oats for shipment to such points east beyond the State of Iowa as the markets and the rates of freight charges might determine would be the most profitable to him as a dealer and shipper of grain; and that during said months there had accumulated on the line of defendant's road in the State of Iowa, large quantities of corn and oats for shipment; that the defendant failed, neglected and refused to furnish cars to ship, for the alleged reason it was unable to supply sufficient cars therefor.

Plaintiff further shows and avers that by the appointment and authority of the president of the defendant's road, who was also the president, at the same time, of the Fremont, Elkhorn & Missouri Valley and of the Sioux City & Pacific Railroad Company, one K. C. Morehouse was appointed to and held the position and exercised the authority of general freight agent of said two last-named companies; and that in the months of January and February, A. D. 1888, a brother of the said K. C. Morehouse was interested in and was a copartner with the owners of large quantities of grain at various points in the State of Nebraska, upon the line of the said Fremont, Elkhorn & Missouri Valley road.

Plaintiff avers that prior to the 30th day of December, 1887, the freight upon corn and oats shipped from points in Nebraska over the line of said several roads to Turner, or Rochelle, or Chicago, Ill., or to points east of Chicago, had uniformly been higher than from points in Iowa on the Chicago and Northwestern railroad, by reason of the greater distance and the greater cost of service; but that on the said 30th day of December, 1887, the said defendant, combining together with the said Morehouse, who was, in fact, under the control and direction of defendant, for the purpose of giving an unlaw-

ful preference to the shippers of corn and oats in Nebraska, and to unlawfully discriminate against this plaintiff and other ship-
13 pers of corn and oats in Iowa, did put in force from points in the State of Nebraska a certain freight tariff upon corn and oats, in words and figures, to wit:

C. & N. W. G. F. D. No. 2927, superseding G. F. D. No. 2724, F., E. & M. V. and S. C. & P. G. F. D. 949, and G. F. D. No. 859 of 1887.

Chicago & Northwestern railway, Fremont, Elkhorn & Missouri Valley, and Sioux City & Pacific railway.

Joint Tariff on Corn and Oats in Car-loads, Taking Effect December 30th, 1887, to Rochelle, Ill., when Destined to New York, Boston, Philadelphia, Baltimore.

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Fremont, Neb	13	Scribner, Neb	13
Cedar Bluffs, Neb	13	Snyder, Neb	13
Colon, Neb	13	Dodge, Neb	13
Wahoo, Neb	13	Howells, Neb	13
Swedenburg, Neb	13	Clarkson, Neb	13
Cresco, Neb	13	Leigh, Neb	14
Davy, Neb	13	Creston, Neb	15
Little Salt, Neb	13	Brookfield, Neb	15
Lincoln, Neb	13	Cornlea, Neb	15
Morse, Neb	13	Lindsay, Neb	15
Linwood, Neb	13	Newman's Grove, Neb	15½
Abie, Neb	13	Bradish, Neb	16
Skull Creek, Neb	13	Albion, Neb	16
Brainard, Neb	14	Loran, Neb	16
102 Dwight, Neb	14	Petersburg, Neb	16
Bee, Neb	14	Elgin, Neb	16
Seward, Neb	14	Crowell, Neb	13
Goner, Neb	14	West Point, Neb	13
Beaver Crossing, Neb	15	Beemer, Neb	15
Hunkins, Neb	16	Wisner, Neb	14
Exeter, Neb	16	Pilger, Neb	14
Buxton, Neb	16	Stanton, Neb	14½
Geneva, Neb	16	Norfolk, Neb	15
Octavia, Neb	16	Hadar, Neb	15
David City, Neb	16	Pierce, Neb	15
Millerton, Neb	16	Foster, Neb	15
Surprise, Neb	14	Plainview, Neb	15½
Poston, Neb	15	Creighton, Neb	16

14 From—	Per 100 lbs.	From—	Per 100 lbs.
Thayer, Neb.	15	Battle Creek, Neb.	15
Houston, Neb.	16	Meadow Grove, Neb.	15½
York, Neb.	16	Burnett, Neb.	15½
Charleston, Neb.	16	Oakdale, Neb.	16
Henderson, Neb.	16	Neleigh, Neb.	16
Stockham, Neb.	16	Clearwater, Neb.	17
Eldon, Neb.	16	Ewing, Neb.	18
Harvard, Neb.	16	Inman, Neb.	18
Emmet, Neb.	19	O'Neill, Neb.	19
Atkinson, Neb.	20	Bassett, Neb.	21
Stuart, Neb.	20	Long Pine, Neb.	22
Newport, Neb.	21	Ainsworth, Neb.	23
Inland, Neb.	16		

Prepaid. Waybill to Rochelle, Ill., via Missouri Valley, at rates given above. For rates from Rochelle to Baltimore, Philadelphia, New York and Boston, see C. & N. W. G. F. D. No. 2604, November 25, 1887, amendments or subsequent issues.

H. R. McCULLOUGH,
G. F. A., C. & N. W. R.

K. C. MOREHOUSE,
G. F. A., S. C. & P. and F. E. & M. V. R's.

Plaintiff avers that said freight tariff was never printed in type and was never circulated or published at any of the stations on defendant's road in the State of Iowa, and no copy thereof was ever filed with the Interstate Commerce Commission as required by law, and the existence of the same was concealed from the knowledge of plaintiff and of shippers in the State of Iowa upon the line of defendant's road, and the benefits and advantages of the rates specified in such tariff were denied to plaintiff and shippers on the line of defendant's road in the State of Iowa.

Plaintiff avers that the said special tariff remained in force at the several stations named therein upon the line of the Fremont, Elkhorn & Missouri Valley railroad in the State of Nebraska from December 30, 1887, up to the 1st of February, 1888, and large quantities of corn and oats were shipped during said time upon and over the several roads aforesaid, to Turner and Rochelle, and thence to Chicago, Ill., at the rate therein specified, to wit: the sum of 11 cents per 100 lbs. from the stations of Blair and Kennard, Neb.

Plaintiff avers that between the 30th day of December, A. D. 1887, and the first day of February, A. D. 1888, and at the several dates named in the Schedule No. 3 hereto attached and made a part of this petition, plaintiff had for shipment at Mapleton, Iowa, aforesaid, the number of pounds of corn and
15 oats in said schedule specified, and plaintiff was prevented and deprived, by reason of the matters herein alleged, of the right to ship the same upon the terms and at the rate given as aforesaid, to the shippers in the State of Nebraska; and plaintiff then and there was compelled to ship and did ship said corn and

oats on and over the road of defendant from said station of Mapleton to Chicago, Ill., and defendant then and there demanded and received for said service the sum of 21 cents per 100 pounds for the transportation of said corn and oats, a distance of only 461 miles, the same being a less distance, and for a like — contemporaneous service over the same line in the same direction, under substantially similar circumstances, as the transportation of corn and oats, as aforesaid, from Blair and Kennard and other points in Nebraska to Chicago, Ill.

Plaintiff avers that the fixing of said points of Turner and Rochelle as the pretended terminus of the shipment of corn and oats under the said special tariff of December 30, 1887, was a mere device to evade the law. That Turner and Rochelle were not grain markets and had no elevators or facilities for handling grain, and said grain was intended to be, and was, in fact, transported by defendant to Chicago, Ill., and was then sold on the market or delivered to connecting roads for eastern seaboard points.

Plaintiff avers that charges so made, demanded, received, and collected from plaintiff as aforesaid, were unlawful, unreasonable, and unjust, and contrary to the provisions of an act of Congress entitled "An act to regulate commerce," approved February 4, 1887, in that an unlawful preference and discrimination was practiced by defendant in favor of shippers of grain in the State of Nebraska and against this plaintiff, a shipper of grain in the State of Iowa, and in that defendant charged, demanded and received a greater compensation for a short than for a longer haul in the same direction, over the same line, the shorter being included in the longer haul, and being for a like and contemporaneous service in the transportation of a like traffic under substantially similar circumstances.

Plaintiff avers that the price and value of corn and oats at the dates of said shipment was at Chicago the price at New York and other seaboard points, less the freight, and the price at Mapleton, in Iowa, was the Chicago price, less the freight, and that plaintiff was damaged by reason of the premises, in a sum equal to the difference in the price charged and received by the defendant and the rate given from Blair and Kennard, Neb., to wit, the sum of 10 cents per 100 pounds upon 24,390 pounds of corn and oats, to wit, the
16 sum of 24.39 dollars, for which sum he asks judgement on this count of his petition with interest at ten per cent. per annum from February 1st, 1888.

And for substitute for sixth count of plaintiff's petition:

That the defendant is a body corporate, organized and existing under the laws of the State of Illinois, and a citizen of the said State, and doing business in the State of Iowa, as hereinafter set forth, as a common carrier of freight and passengers, and owns and operates and did own and operate at the dates hereinafter set forth as such common carrier, a certain line of railroad from the city of Chicago, in the State of Illinois, to Missouri Valley and Council Bluffs, in the State of Iowa, and at the same time the said defendant owned the majority of the stock and by the same general officers and board of directors controlled and operated the Fremont, Elkhorn & Missouri

Valley railroad and the Sioux City & Pacific railroad, which roads connected with the Chicago and Northwestern railway at Missouri Valley and extended westward to points in the State of Nebraska.

Plaintiff avers that the respective distances from the several points in Nebraska and Iowa to the city of Chicago, over the said roads, are and were as follows, to wit:

From	Blair, Nebraska, to Chicago	480 miles
"	Kennard, Nebraska, to Chicago	487 miles
"	Missouri Valley, Iowa, to Chicago	467 miles
"	Dennison, Iowa, to Chicago	423 miles
"	Maple River, " " "	398 miles
"	Carroll, " " "	395 miles
"	Glidden, " " "	388 miles
"	Scranton, " " "	378 miles

The plaintiff avers that during the months of January and February, A. D. 1888, — had on hands at Maple River Junc., in the State of Iowa, large quantities of corn and oats for shipment to such points east beyond the State of Iowa as the markets and the rates of freight charges might determine would be most profitable to him as a dealer and shipper of grain; and that during said months there had accumulated on the line of defendant's road in the State of Iowa, large quantities of corn and oats for shipment, that the defendant failed, refused and neglected to furnish cars to ship, for the alleged reason that it was unable to supply sufficient cars therefor.

Plaintiff further shows and avers that by the appointment and authority of the president of the defendant's road, who was also the president, at the same time, of the Fremont, Elkhorn & Missouri Valley and of the Sioux City & Pacific Railroad Companies,
17 one K. C. Morehouse was appointed to and held the position and exercised the authority of general freight agent of said two last-named companies; and that in the months of January and February, A. D. 1888, a brother of the said K. C. Morehouse was interested in and was a copartner with the owners of large quantities of grain at various points in the State of Nebraska, upon the line of the said Fremont, Elkhorn & Missouri Valley road.

Plaintiff avers that prior to the 30th day of December, 1887, the freight upon corn and oats shipped from points in Nebraska over the line of said several roads to Turner, or Rochelle, or Chicago, Illinois, or to points east of Chicago had been uniformly higher than from points in Iowa on the Chicago & Northwestern railroad, by reason of the greater distance and the greater cost of service; but that on the said 30th day of December, 1887, the said defendant, combining together with the said Morehouse, who was, in fact, under the control and direction of defendant for the purpose of giving an unlawful preference to the shippers of corn and oats in Nebraska, and to unlawfully discriminate against this plaintiff and other shippers of corn and oats in Iowa, did put in force from points in the State of Nebraska a certain freight tariff upon corn and oats, in words and figures, to wit:

C. & N. W. G. F. D. No. 2927, superceding G. F. D. No. 2724, F., E. & M. V. and S. C. & P. G. F. D. 949, and G. F. D. No. 859 of 1887.

Chicago & Northwestern railway, Fremont, Elkhorn & Missouri Valley, and Sioux City & Pacific railway.

Joint Tariff on Corn and Oats in Car-loads, Taking Effect December 30, 1887, to Rochelle, Ill., when Destined to New York, Boston, Philadelphia, Baltimore.

From—	Per 100 lbs.	From—	Per 100 lbs.
Blair, Neb	11	Hastings, Neb	16
Kennard, Neb	11	Nickerson, Neb	13
Arlington, Neb	12	Hooper, Neb	13
Fremont, Neb	13	Scribner, Neb	13
Cedar Bluffs, Neb	13	Snyder, Neb	13
Colon, Neb	13	Dodge, Neb	13
Wahoo, Neb	13	Howells, Neb	13
Swedenburg, Neb	13	Clarkson, Neb	13
Cresco, Neb	13	Leigh, Neb	14
Davy, Neb	13	Creston, Neb	15
Little Salt, Neb	13	Brookfield, Neb	15
Lincoln, Neb	13	Cornlea, Neb	15
Morse, Neb	13	Lindsay, Neb	15
18 Linwood, Neb	13	Newman's Grove, Neb	15½
Abie, Neb	13	Bradish, Neb	16
Skull Creek, Neb	13	Albion, Neb	16
Brainard, Neb	14	Loran, Neb	16
102 Dwight, Neb	14	Petersburg, Neb	16
Bee, Neb	14	Elgin, Neb	16
Seward, Neb	14	Crowell, Neb	13
Goner, Neb	14	West Point, Neb	13
Beaver Crossing	15	Beemer, Neb	15
Hunkins, Neb	16	Wisner, Neb	14
Exeter, Neb	16	Pilger, Neb	14
Buxton, Neb	16	Stanton, Neb	14½
Geneva, Neb	16	Norfolk, Neb	15
Octavia, Neb	16	Hadar, Neb	15
David City, Neb	16	Pierce, Neb	15
Millerton, Neb	16	Foster, Neb	15
Surprise, Neb	14	Plainview, Neb	15½
Poston, Neb	15	Creighton, Neb	16
Thayer, Neb	15	Battle Creek, Neb	15
Houston, Neb	16	Meadow Grove, Neb	15½
York, Neb	16	Burnett, Neb	15½
Charleston, Neb	16	Oakdale, Neb	16
Henderson, Neb	16	Neleigh, Neb	16

Stockham, Neb.	16	Clearwater, Neb.	17
Eldon, Neb.	16	Ewing, Neb.	18
Harvard, Neb.	16	Inman, Neb.	18
Emmet, Neb.	19	O'Neill, Neb.	19
Atkinson, Neb.	20	Bassett, Neb.	21
Stuart, Neb.	20	Long Pine, Neb.	22
Newport, Neb.	21	Ainsworth, Neb.	23
Inland, Neb.	16		

Prepaid. Waybill through to Rochelle, Ill., via Missouri Valley, at rates given above. For rates from Rochelle to Baltimore, Philadelphia, New York and Boston, see C. & N. W. G. F. D. No. 2604, November 25, 1887, amendments or subsequent issues.

H. R. McCULLOUGH,
G. F. A., C. & N. W. R.

K. C. MOREHOUSE,
G. F. A., S. C. & P. and F., E. & M. V. R's.

Plaintiff avers that said freight tariff was never printed in type and was never circulated or published at any of the stations on defendant's road in the State of Iowa, and no copy thereof was ever filed with the Interstate Commerce Commission as required by law, and the existence of the same was concealed from the knowledge of plaintiff and of shippers in the State of Iowa upon the line of the defendant's road, and the benefits and advantages of the rates specified in such tariff were denied to plaintiff and shippers on line of defendant's road in the State of Iowa.

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Plaintiff avers that said special tariff remained in force at the said several stations named therein upon the line of the Fremont, Elkhorn & Missouri Valley railroad, in the State of Nebraska from December 30th, 1887, up to 1st of February, 1888, and large quantities of corn and oats were shipped during said time upon and over the several roads aforesaid, to Turner and Rochelle, thence to Chicago, Illinois, at the rates therein specified, to wit: the sum of 11 cents per 100 pounds from the stations of Blair and Kennard, Nebraska.

Plaintiff avers that between the 30th day of December, 1887, and the first day of February, 1888, and at the several dates named in the Schedule- No. 6 & 7 attached to original petition, and made a part of this petition, plaintiff had for shipment at Maple River Jct., Iowa, aforesaid, the number of pounds of corn and oats in said schedule- specified and plaintiff was prevented and deprived of the matters herein alleged, of the right to ship the same upon the terms and at the rate given as aforesaid, to the shippers in the State of Nebraska; and plaintiff then and there was compelled to ship and did ship said corn and oats on and over the road of defendant from said station of Maple River Junction to Chicago, Ill., and defendant then and there demanded and received for said service the sum of 19 cents per 100 pounds for the transportation of said corn and oats, a distance of only 398 miles, the same being a less distance, and for a like — contemporaneous service over the same line in the same di-

rection, under substantially similar circumstances, as the transportation of corn and oats, as aforesaid, from Blair and Kennard and other points in Nebraska to Chicago, Ill.

Plaintiff avers that the fixing of said points of Turner and Rochelle as the pretended terminus of the shipment of corn and oats under said special tariff of December 30, 1887, was a mere device to evade the law. That Turner and Rochelle were not grain markets and had no elevators or facilities for handling grain and said grain was intended to be, and was, in fact, transported to Chicago, Ill., and was there sold on the market or delivered to connecting roads for eastern seaboard points.

Plaintiff avers that the charges so made, demanded, received and collected from plaintiff, as aforesaid, were unlawful, unreasonable and unjust and contrary to the provisions of an act of Congress entitled "An act to regulate commerce," approved February 4, 1887, in that an unlawful preference and discrimination was practiced by defendant in favor of shippers of grain in the State of Nebraska and against this plaintiff, a shipper of grain in the State of Iowa, and in that defendant charged, demanded and received a greater compensation for a short than for a longer haul in the same direction, over the same line, the shorter being included in the longer, and being for a like and contemporaneous service in the transportation of a like traffic under substantially similar circumstances.

Plaintiff avers that the price and value of corn and oats at the dates of said shipment was at Chicago the price at New York and other seaboard points, less the freight, and the price at Maple River Jct., in Iowa, was the Chicago price less the freight, and that plaintiff was damaged by reason of the premises, in a sum equal to the difference in the price charged and received by the defendant and the rate given from Blair and Kennard, Neb., to wit: the sum of 8 cents per 100 pounds upon 24,000 — oats and 182,100 pounds corn, to wit: the sum of 164.88 dollars, for which sum he asks judgment on this count of his petition.

And for fourth count of petition, plaintiff avers:

And for other, further, and different cause of action, plaintiff claims of defendant the further sum of — dollars as money justly due said defendant, and for cause of such claim shows:

That the defendant is and was at the times and dates of the happening and commission of the wrongs as hereinaftrer set forth, a common carrier, engaged in the business of transporting freight and passengers over certain lines of railroad in the States of Iowa, Illinois and Nebraska, and in connection with other railroads in Chicago, east to New York, Philadelphia, Boston, Baltimore and other seaboard points, as more particularly set forth in the first count of this petition.

Plaintiff avers that he is a citizen of the State of Iowa, and resides at Carroll in said State and has been such resident and citizen and done business at Carroll in the State of Iowa as a grain buyer and shipper prior to and ever since the 1st day of August, 1887.

Plaintiff avers that the defendant, The Chicago — Northwestern

Railroad Company, combining together with certain other railroad companies operating roads east of Chicago to the city of New York and other seaboard points in connection with the said K. C. Morehouse, as named in the former counts of this petition, to give preference to shippers of grain on the line of the Fremont, Elkhorn & Missouri Valley railroad in the State of Nebraska, and unlawfully to discriminate against plaintiff and other shippers of grain in the State of Iowa, did issue and put in force on the 17th day of February, 1888, at all the stations on the said Fremont, Elkhorn & Missouri Valley railroad in Nebraska between Blair and Skull Creek and each of said points, a certain tariff on corn and oats destined for New York and other seaboard points, whereby it proposed to transport, and did on and between said 17th day of February and the first day of March, A. D. 1888, transport corn and oats from Blair and other points in Nebraska, on the line of said road, to New York for 36½ cents per 100 pounds, and to Boston for — cents per 100 pounds, and to Philadelphia for 34½ cents per 100 pounds and to Baltimore for 33½ cents per 100 pounds.

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Plaintiff avers that all of said points on the Fremont, Elkhorn & Missouri Valley road were a greater distance from Chicago and from New York and other seaboard points aforesaid, than the stations on the defendant's road in the State of Iowa.

That the said tariff only provided for and named points in Nebraska, and said tariff was not furnished to or made known to the agents of defendant at Iowa points and was not filed with the Interstate Commerce Commission, and was not printed or published as required by said commission or by law, and the rate therein named was denied to shippers in Iowa points on defendant's road. That the only rate on corn and oats made known during February, 1888, to shippers at Iowa points on defendant's road was a local rate to Chicago and a rate of 27½ from Chicago to New York, and a correspondingly high rate from Chicago to other seaboard points.

That said local rate from Carroll to Chicago was 19 cents per 100 pounds.

Plaintiff further shows and avers that at and during the time of the shipment of corn and oats from Nebraska as aforesaid to New York and other seaboard points, as aforesaid, there had accumulated at the stations on defendant's road in Iowa large quantities of corn and oats for shipment east, but that defendant failed, refused and neglected to ship the same, and delayed the shipment thereof, upon an alleged reason that they had not sufficient cars to ship the same.

Plaintiff avers that between the 17th day of February and the 1st day of March, A. D. 1888, and at the several dates named in Schedule No. 4 attached to original petition and made a part of this petition plaintiff had for shipment at Carroll, Iowa, aforesaid the number of pounds of corn and oats in the said schedule described, and plaintiff was prevented and deprived, by reason of the matters herein alleged, of the right to ship the same upon the terms and at the rates given to shippers in the State of Nebraska, and plaintiff then and there was compelled to ship and did ship

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said corn and oats on and over the road of defendant from said station of Carroll to Chicago, Ill., and defendant then and there demanded, and received for said service the sum of 19 cents per hundred pounds for the transportation of said corn and oats to Chicago, and subjected said plaintiff to a further charge of 27½ cents per 100 pounds to transport the same to New York and a like local charge to other seaboard points, or dispose of the same at Chicago at 27½ less per hundred than the price at New York.

Plaintiff avers that the charges so made, demanded and received and collected as aforesaid were unlawful, unreasonable and unjust, and contrary to the provisions of an act of Congress entitled "An act to regulate commerce," approved February 4th, 1887, in that an unlawful preference and discrimination was practiced by defendant in favor of shippers of grain in the State of Nebraska and against this plaintiff a shipper of grain in the State of Iowa, and in that defendant charged and demanded a greater compensation for a short than for a longer haul in the same direction over the same line, the shorter being included in the longer haul and being for a like and contemporaneous service in the transportation of a like traffic under substantially similar circumstances.

Plaintiff avers that the price and value of corn and oats at the dates of said shipments was at Chicago the New York or other seaboard price less the freight, and the price at Carroll, Iowa, was the Chicago price less the freight, and that plaintiff was damaged, by reason of the premises in a sum equal to the difference between the aggregate of the two local rates from Carroll to Chicago and from Chicago to New York to wit 46½ cents and the said sum of 36½ cents the rate given from said Nebraska points to New York, which difference was the sum of 10 per 100 pounds on 107,750 pounds of corn and oats named in Schedule No. 4 aforesaid, for which the plaintiff asks judgment on this second count of his petition.

Whereupon, upon the several counts hereinbefore set out plaintiff asks judgment against the defendant for the sum of $1,550 *dollars* and for costs and the further sum of 200 dollars attorneys' fee for the prosecution of this suit.

C. C. & C. L. NOURSE,
Attorneys for Plaintiff.

23 STATE OF IOWA, } ss:
—— *County,* }

I, E. M. Parsons, being first duly sworn according to law, do depose and say that I am plaintiff in the above-entitled cause; that I know the contents of the foregoing petition and that the statements thereof are true as I verily believe.

—— ——.

Sworn to and subscribed to before me this 24th day of Dec., A. D. 189–, by the above-named E. M. Parsons.

—— ——,
Notary Public.

PARSONS' EXHIBITS Nos. 1, 2, 3, 4, & 5.

Date.	No. of car.		Weight.
	Exhibit No. 2, corn from	21 11	
	Correctionville, Ia.	10	
Between Dec. 30, 1887, to Feb. 1, 1888.	4177		28,740
	1435		30,420
	376		41,350
	32840		28,150
	2252		29,080
	30078		28,900
	4046		28,050
	32510		27,020
	Total weight		241,710 10
	Overcharge		241 71
	Exhibit No. 3, corn	21 11	
	from Mapleton.	10	
Between Dec. 30, '87, to Feb'y 1, 1888.	36774		24,390 10
	Overcharge		$24 39
24	Exhibit No. 1, corn from	21 19	
	Correctionville, Ia.	2	
1888. Feb'y.	31474		27,750
	40058		39,100
	5952		31,250
	9252		34,100
	25205		36,300
	Total weight		168,500 2
			$33 70

PARSONS' EXHIBITS NOS. 1, 2, 3, 4, & 5.

Date.	No. car.	Weight.
1888.	Exhibit No. 4, corn from Carroll, Ia.	
Feb'y 20.		
" "	46036	41,600
" "	11420	27,300
" 21.	47228	38,850
	Total weight	107,750
		10
	Overcharge	$107 76
	Exhibit No. 5, oats from Carroll, Ia.	19 11 — 8
1887.		
Dec. 30.	15610	44,660
'88.		
Jan. 21.	13150	29,860
	Total weight	74,520
		8
	Overcharge	59 61
	Exhibit No. 6, oats from Maple River Junc., Ia.	19 11 — 8
1888.		
Jan'y 1.	8364	24,000
		8
	Overcharge	19 20
25	Exhibit No. 7, corn from Maple River Junc., Ia.	19 11 — 8
1888.		
Jan'y 9.	30220	33,500
" 11.	4746	30,700
" 24.	3880	30,000
" 28.	13740	30,100
" "	8710	30,100
" "	11960	27,700
		182,100
		8
	Overcharge	$145 68

Claimed	Ex.	1..	$33 70,	allowed	$33 70	Claimed 10 cts. We allowed .02 cts. per 100 lbs. also cut out 8,750 lbs. ac. error in weight.
"	"	2..	241 71	"	40 86	
"	"	3..	24 39	"		Cut out, not able to locate.
"	"	4..	107 75	"		Ex. 4, 5, 6, 7 & 8 cut out account all charged at tariff rate, 19 cts. per 100 lbs.
"	"	5..	59 61	"		
"	"	6..	164 88	"		
"	"	7..	145 68	"		
"	"	8..	890 91	"		
			$1,668 63		$74 56	

Chicago & Northwestern Railway Co.

Statement of waybilling filed in frt. aud'r's office of corn ship-ed by E. M. Parsons consigned to various persons waybilled from Correctionville, Ia., to East Chicago, Ill., during Jan'y & Feb'y, 1888, as follows:

Date of W. B. 18	Car No. charged.	W. B. No. should be—	Article.	Weight.	Rate.	Local charges.
			Corn	372,720	21	78,273
			Same	372,720	19	70,817
						ac. 7,456

Order H. R. McCullough, G. F. A., dated May 1, '90.

26 PARSONS' EXHIBIT 8.

19
11
—
8

Corn from Carroll, Iowa.

Date.	No. car.	Weight.	
1887.			
Dec. 31.	1556	25,600	Chicago.
" "	13768	25,600	"
1888.			
Jan'y 4.	19012	24,600	"
" "	5805	24,920	"
" "	4062	25,200	"
" "	5244	24,960	"
" "	413	24,950	"
" "	8756	24,870	"
" 6.	4690	24,100	"
" "	1486	24,950	"
" 9.	11866	28,650	"
" "	19158	39,100	Manatowack.

Jan'y	11.	32296	28,000	Chicago.
"	12.	8690	28,600	"
"	"	2204	28,450	"
"	12.	4688	20,650	"
"	16.	11568	28,300	"
"	"	17208	38,550	"
"	17.	11560	28,000	"
"	20.	7494	28,440	"
"	"	4302	28,050	"
"	"	8636	28,400	Two Rivers.
"	"	1076	28,350	"
"	21.	4596	30,151	Chicago.

Date.		No. car.	Weight.	
1888.				
Jan'y	24.	31966	28,150	Chicago.
"	25.	6824	28,270	Milwaukee.
"	26.	1880	38,700	Geneva, Ill.
"	"	7734	28,800	Chicago.
"	"	550	24,800	"
"	27.	14406	28,300	"
"	"	830	38,500	"
"	28.	9264	28,000	"
"	"	32156	27,700	"
"	"	658	28,200	"
"	"	6106	28,200	"
"	"	18343	31,800	"
"	31.	10356	28,200	"
27				
"	"	7642	28,000	"
Feb.	1.	1638	28,600	"
		Total weight	1,113,640	
			8	
		Overcharge	$890 91	

Indorsed: 3435, law. E. M. Parsons *vs.* The C. & N. W. R'y Co. Amended and substituted petition. Filed December 28, 1892. E. R. Mason, clerk. C. C. & C. L. Nourse, for plaintiff.

Circuit Court of the United States, Southern District of Iowa, Central Division.

And afterwards, to wit, on the 17th day of October, A. D. 1893, there was filed in the clerk's office of said court "demurrer to amended petition," which said demurrer is in the words and figures following, to wit:

E. M. PARSONS, Plaintiff,
vs.
CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant. } At Law. No. 3435.

Demurrer to 2d, 3d, 4th, 5th, 6th, & 7th Counts of the Amended and Substituted Petition.

The defendant demurs to each of the foregoing counts because the allegations thereof show on their face that the rate from Nebraska points to eastern seaboard points was made under a joint tariff arrangement—several different railway companies, and that the rate paid by plaintiff on all his shipments was a local rate for shipments wholly upon defendant's own line of railway between Iowa points and Chicago, Illinois, and said rate so paid by plaintiff cannot be measured or condemned by the rate fixed by said joint tariff, nor by the proportion of such joint-tariff rate received by defendant, and defendant may lawfully charge more for its local rate upon its own line to Chicago than it receives for its share of a longer haul under a joint tariff with other railway companies to the seaboard.

That under said allegations, the rate charged plaintiff and by him paid to defendant was not unlawful under the fourth section of said act of Congress, and therefore did not constitute unlawful dis-
28 crimination or preference under the third section of said act, and the same was not prohibited or rendered unlawful by any other provision of said act of Congress, nor by any other law.

Wherefore defendant prays judgment for its costs.

(S'g'd) L. W. BOWERS AND
N. M. HUBBARD,
Attorneys for Defendants.

Indorsed: Law, 3435. E. M. Parsons *vs.* The Chicago & N. W. R'y Co. Demurrer to amended petition. Filed Oct. 17, '93. Ed. R. Mason, clerk.

United States Circuit Court, Southern District of Iowa, Central Division, October Term, 1893.

WEDNESDAY MORNING, *Oct. 18th*, 1893—nine o'clock.

Court met pursuant to adjournment.
Present: Hon. O. P. Shiras, Hon. Jno. S. Woolson, judges.

And afterwards, to wit, on the 18th day of October, A. D. 1893, the same being of the October term, 1893, of said court, there appears in the records of the proceedings thereof in said cause the following entry, to wit:

E. M. PARSONS
vs.
CHICAGO & NORTHWESTERN RAILWAY COMPANY. } No. 3435. Law.

This cause came on this day for hearing upon the defendant's demurrer to plaintiff's petition and amendment thereto. The plaintiff appeared by C. C. & C. L. Nourse, and defendant by N. M. Hubbard, and the court having heard argument by counsel order that said demurrer be and the same is hereby sustained, and plaintiff electing to stand upon his petition and amendment and refusing to further plead.

It was ordered and adjudged, that the plaintiff take nothing by his said petition and that said defendant go hence without day and recover its costs taxed at $—— and that execution issue therefor, to all of which ruling and judgment plaintiff at the time excepted.

In the Circuit Court of the United States, Southern District of Iowa, Central Division.

And afterwards, to wit, on the 26th day of December, 1893, there was filed in the office of the clerk of the said court "assignment of errors;" which said assignment is in the words and figures following, to wit:

29 *Assignment of Errors.*

E. M. PARSONS
vs.
THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY. } No. 3435. Law.

The plaintiff, E. M. Parsons, respectfully states, that there is manifest error on the face of the record in the above-entitled cause in the following particulars, to wit:

1. The circuit court erred in sustaining the demurrer to plaintiff's amended petition, and to the second, third, fourth, fifth, sixth, and seventh counts thereof, and to each of said counts and rendering judgment for defendants upon said demurrer.

2. The circuit court erred in holding that the said second count of the amended petition set forth and alleged no cause of action.

3. The circuit court erred in holding that the said third count of the amended petition did not state a cause of action.

4. The circuit court erred in holding that the said fourth count of the amended petition did not state a cause of action.

5. The circuit court erred in holding that the said fifth count of the amended petition did not state a cause of action.

6. The circuit court erred in holding that the said sixth count of the amended petition did not state a cause of action.

7. The circuit court erred in holding that the said seventh count of the amended petition did not state a cause of action.

8. The circuit court erred in holding that said amended petition was insufficient in law for the reason that the rate from Nebraska

points to eastern seaboard points was made under a joint-tariff arrangement between several different railway companies, and because that the shipments by plaintiff were upon defendant's road alone, and the charge made was for a local rate over its own line.

9. The circuit court erred in holding the amended petition insufficient in law under the fourth section of the act of Congress and was also insufficient under the third section of the act of Congress of the Interstate Commerce act, and that the unlawful discriminations charged in the several counts of said petition were not prohibited by law.

(S'g'd) C. C. & C. L. NOURSE,
Attorneys for Plaintiff.

Indorsed: E. M. Parsons *vs.* The Chicago & N. W. Railway Company. Assignment of errors. Filed Dec. 26, 1893. Ed. R. Mason, clerk.

In the Circuit Court of the United States, Southern District of Iowa, Central Division.

And afterwards, to wit, on the 26th day of December, A. D. 1893, in the clerk's office of said court there was filed petition for writ of error, which said petition is in the words and figures following, to wit:

Petition for Writ of Error.

E. M. PARSONS, Plaintiff in Error,
vs.
CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Defendant in Error.

To the Honorable O. P. Shiras, United States district judge for the northern district of Iowa, and presiding judge at the October term, 1893, of said United States circuit court:

Your petitioner, E. M. Parsons, respectfully states that at the October term, 1893, of said United States circuit court for the southern district of Iowa, central division, there was tried a case then and there pending, wherein petitioner, E. M. Parsons, was plaintiff, and The Chicago and Northwestern Railway Company was defendant, in which judgment was then and there rendered and entered in favor of said Chicago and Northwestern Railway Company and against your petitioner, upon demurrer for costs of suit.

And your petitioner has filed herewith in the office of the clerk of said United States circuit court an assignment of errors in said cause as required by the rules of the United States circuit court of appeals for the eighth circuit, and now here brings its supersedeas bond in the sum of five hundred dollars, with good and sufficient surety conditioned as required by law, and the rules of said United States circuit court.

Wherefore your petitioner prays that a writ of error be granted,

directed to the judges of said circuit court of the United States for the southern district of Iowa, central division, commanding
31 that the record in said cause be certified to said United States circuit court of appeals for the eighth circuit, and that a citation issue as provided by law, and that a stay of proceedings be ordered until the said errors shall have been heard and determined.

(Signed) C. C. & C. L. NOURSE,
Attorneys for Pl'tss in Error.

A writ of error is hereby allowed, as prayed for in the foregoing petition, this 20th day of December, A. D. 1893.

(Signed) O. P. SHIRAS, *Judge.*

Indorsed: E. M. Parsons *vs.* The Chicago & N. W. Railway Company. Filed Dec. 26, 1893. Ed. R. Mason, clerk.

And afterwards, to wit, on the 29th day of December, A. D. 1893, there was filed in the office of the clerk of the circuit court of the United States writ of error; which said writ is in the words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of United States circuit court for the southern district of Iowa, central division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court before you at the October term, 1893, thereof, between E. M. Parsons, plaintiff, and The Chicago and Northwestern Railway Company, defendant, a manifest error hath happened to the great damage of the said E. M. Parsons, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid, at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States circuit court of appeals, for the eighth circuit, on or before the — day of ——, 189–, to the end that the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

32 Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this — day of ——, in the year of our Lord one thousand eight hundred and ninety-three.

Issued at office in Des Moines, Iowa, with the seal of
[SEAL.] the circuit court of the United States, for the southern district of Iowa, central division, and dated as aforesaid.

(Signed) EDWARD R. MASON,
Clerk of said U. S. Cir. Court.

Allowed by—
O. P. SHIRAS, *Judge.*

Indorsed: E. M. Parsons *vs.* The Chicago and N. W. Railway Company. Writ of error. Filed Dec. 29, 1893. Ed. R. Mason, clerk.

And afterwards, to wit, on the 29th day of December, 1893, there was filed in the office of the clerk of the United States circuit court, "bond," which said bond is in the words and figures following, to wit:

Know all men by these presents that E. M. Parsons, is principal, and N. C. Stevens, as surety, hereby acknowledge themselves to be indebted to The Chicago and Northwestern Railway Company in the sum of five hundred dollars, lawful money of the United States, for the payment whereof well and truly to be made unto the said Chicago and Northwestern Railway Company, they hereby bind themselves and their legal representatives firmly by these presents.

But upon the following conditions: Whereas, the said E. M. Parsons has sued out a writ of error to review the judgment and decisions of the United States circuit court for the southern district of Iowa, central division, in a cause therein pending, wherein said E. M. Parsons is plaintiff and the said Chicago and Northwestern Railway Company is defendant:

Now, therefore if said E. M. Parsons, plaintiff in error, shall prosecute his writ of error to effect and answer all damages, interest and costs, if *it* fail to make *its* said plea good, this obligation to be null and void, otherwise to be of full force and effect.

Signed this 23 day of December, 1893.

E. M. PARSONS,
H. C. STEVENS.

33 STATE OF IOWA, } ss:
—— *Count-*, }

I, H. C. Stevens, being duly sworn on oath say that I am the surety named in the foregoing bond; that I am a resident of the State of Iowa; that I am worth over and above all my liabilities, the sum of one thousand dollars, and have property in the State of Iowa not exempt from execution of the value of one thousand dollars.

(S'g'd) H. C. STEVENS.

Subscribed in my presence and sworn to before me by the said H. C. Stevens this 23 day of December, 1893.

[SEAL.] J. W. KENNEBECK,
Cl'k Dist. Court.

STATE OF IOWA, } ss:
Carroll County, }

I, J. W. Kennebeck, clerk of the district court within and for said county, do hereby certify that the surety whose name is subscribed to the foregoing bond, is good and sufficient for the sum therein named, and I, as said clerk, would accept and approve the same if presented to me in this county for the purposes therein set forth.

Witness my hand and seal of said court this 23 day of Dec., A. D. 1893.

[SEAL.] J. W. KENNEBECK, *Clerk D. C.*

The above bond approved Dec. 26, '93.

O. P. SHIRAS, *Judge.*

Indorsed: E. M. Parsons *vs.* The Chicago & N. W. Railway Company. Bond. Filed Dec. 29, '93. Ed. R. Mason, clerk.

The United States of America to The Chicago and Northwestern Railway Company, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the central division of the southern district of Iowa, wherein E. M. Parsons is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in
34 error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable O. P. Shiras, judge of the circuit court of the United States for the northern district of Iowa, this 26th day of December, in the year of our Lord one thousand eight hundred and ninety-three.

O. P. SHIRAS,
United States District Judge for the Northern District of Iowa, Sitting in U. S. Circuit Court for Southern District of Iowa by Assignment.

We do hereby acknowledge due and legal service of the within writ of citation at Des Moines, Iowa, this 5th day of January, A. D. 1894.

HUBBARD & DAWLEY.

United States circuit court, —— division of the northern district of Iowa. E. M. Parsons *vs.* The Chicago & Northwestern Railway Company. Citation. Filed Jan. 6, 1894. Ed. R. Mason, clerk.

In the Circuit Court of the United States for the Southern District of Iowa, Central Division.

I, E. R. Mason, clerk of said court, do hereby certify that the transcript to which this certificate is attached contains full, true and complete copies of the petition, amendment to petition, demurrer, order sustaining demurrer, assignment of errors, petition for writ of error, writ of error, appeal bond, citation, in a certain cause in said court wherein E. M. Parsons — plaintiff and Chicago and Northwestern R'y Co. defendant, as full, true and complete as the originals of the same now remain on file and of record in my office.

Seal of the U. S. Circuit Court, Southern District of Iowa.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of Des Moines, in said district, this 20th day of January, A. D. 1894.

E. R. MASON,
Clerk U. S. Circuit Court, Southern District of Iowa.

Filed Feb. 16, 1894.

JOHN D. JORDAN, *Clerk.*

35 *Appearance for Plaintiff in Error.*

And on the twenty-first day of February, A. D. 1894, an appearance for plaintiff in error was filed in the clerk's office in said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1894.

E. M. PARSONS, Plaintiff in Error,
vs.
THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY. } No. 407.

The clerk will enter my appearance as counsel for the plaintiff in error.

C. C. NOURSE.

Endorsed: U. S. circuit court of appeals, eighth circuit, May term, 1894. No. 407. E. M. Parsons, pl'ff in error *vs.* The Chicago & Northwestern R'y Co. Appearance. Filed Feb. 21, 1894. John D. Jordan, clerk. C. C. Nourse, Des Moines, Iowa, counsel for pl'ff in error.

Stipulation as to Printing Record.

And on the twenty-first day of February, A. D. 1894, a stipulation as to printing record was filed in the clerk's office in said cause in the following words, to wit:

In the Circuit Court of Appeals of the Eighth Judicial Circuit.

E. M. PARSONS, Plaintiff,
vs.
CHICAGO & NORTHWESTERN RAILWAY COMPANY, Defendant.

Error to the circuit court of the United States, southern district of Iowa, central division.

36 *Stipulation.*

In the above-entitled cause it is hereby stipulated that the clerk shall print of the record the following parts only:

I. Amended and substituted petition of plaintiff, with the schedules attached to the original petition as referred to and made part of the amended petition.

II. The demurrer of defendant to the amended petition.

III. The original entry and decision of the court sustaining the demurrer and exception of the plaintiff thereto.

IV. Assignment of errors.

V. Petition for writ of error and order of court allowing the same.

VI. Writ of errors.

VII. Bond.

VIII. Citation and service of same.

IX. Certificate of clerk of the circuit court.

C. C. & C. L. NOURSE,
Att'ys for Pl'ff in Error, E. M. Parsons.
HUBBARD & DAWLEY,
Att'ys for Def't.

Endorsed: No. 407. E. M. Parsons, plaintiff in error, *vs.* Chicago & Northwestern Railway Company. Stipulation as to printed record. Filed Feb. 21, 1894. John D. Jordan, clerk.

Special Appearance for Defendant in Error.

And on the twenty-fifth day of April, A. D. 1894, a special appearance for defendant in error was filed in the clerk's office in said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1894.

37 E. M. PARSONS, Plaintiff in Error,
vs.
THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY. } No. 407.

The clerk will enter my special appearance as counsel for the defendant in error for the sole and special purpose of objecting to the jurisdiction of this court and of moving to dismiss the writ of error because it does not appear that the citation was ever served upon the defendant in error.

N. M. HUBBARD.

Endorsed: U. S. circuit court of appeals, eight circuit, May term, 1894. No. 407. E. M. Parsons, pl'ff in error, *vs.* Chicago & Northwestern Railway Co. Special appearance. Filed Apr. 25, 1894. John D. Jordan, clerk. N. M. Hubbard, Cedar Rapids, Iowa, counsel for def't in error.

Appearance for Defendant in Error.

And on the ninth day of May, A. D. 1894, an appearance for defendant in error was filed in the clerk's office in said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1894.

E. M. PARSONS, Plaintiff in Error,
vs.
THE CHICAGO & NORTHWESTERN R'Y CO. } No. 407.

The clerk will enter our appearance as counsel for the defendant in error.

LLOYD W. BOWERS AND
N. M. HUBBARD.

Endorsed: U. S. circuit court of appeals, eighth circuit, May term, 1894. No. 407. E. M. Parsons, pl'ff in error, *vs.* The Chicago & Northwestern Railway Co. Appearance. Filed May
38 9, 1894. John D. Jordan, clerk. Lloyd W. Bowers and N. M. Hubbard, counsel for def't in error.

Order of Submission.

And on the 24th day of May, A. D. 1894, in the record of the proceedings of said court is an entry of the submission of said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1894.

THURSDAY, *May* 24, 1894.

E. M. PARSONS, Plaintiff in Error,
vs.
THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Defendant in Error. } No. 407.

In error to the circuit court of the United States for the southern district of Iowa.

This cause having been called for hearing in its regular order, argument was commenced by Mr. C. C. Nourse in behalf of plaintiff in error, continued by Mr. Lloyd W. Bowers in behalf of defendant in error, and concluded by Mr. C. C. Nourse in behalf of plaintiff in error.

Thereupon this cause was submitted to the court upon the transcript of record from said circuit court and the brief of counsel filed herein.

Opinion.

And on the twenty-fourth day of September, A. D. 1894, an opinion of said United States circuit court of appeals was filed in said cause in words and figures following, to wit:

39 United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1894.

E. M. PARSONS, Plaintiff in Error,
vs.
THE CHICAGO AND NORTHWESTERN Railway Company, Defendant in Error.

No. 407. In Error to the Circuit Court of the United States for the Southern District of Iowa.

Before Caldwell, Sanborn, and Thayer, circuit judges.

Statement.

This was an action for damages founded on the provisions of the act of Congress of February 4, 1887, commonly called the interstate-commerce act. (24 Stat. 379.) Plaintiff in error, E. M. Parsons, was the plaintiff in the trial court. There were five counts in the declaration. The first of these counts contained in substance the following allegations: That the defendant corporation, The Chicago & Northwestern Railway Company, is a common carrier of freight and passengers, and operates a line of railroad extending from the city of Chicago, Illinois, to Missouri Valley and Council Bluffs in the State of Iowa; that it also owned the majority of the stock and by the same general officers and board of directors controlled and operated two other roads, to wit: the Fremont, Elkhorn & Missouri Valley railroad and the Sioux City & Pacific railroad, which latter roads connected with the Chicago & Northwestern railway at Missouri Valley and extended westwardly from that point to points in the State of Nebraska; that in February, 1888, the plaintiff was a shipper of corn residing in the State of Iowa and had accumulated a large amount of corn for shipment to Chicago and eastern cities at various stations in Iowa along the line of the defendant
40 company's railroad, particularly at a place called Carroll in said State, which was three hundred and ninety-five miles west of Chicago; that previous to December 30, 1887, the freight rate on corn and oats shipped from Nebraska points over the aforesaid railroads to Rochelle, Illinois, and to Chicago, Illinois, had been higher than on shipments from Iowa points to the same places, because the distance was greater and the cost of carriage greater; that on December 30, 1887, the defendant company, acting in concert with one K. C. Morehouse, who was the general freight agent of the Sioux City & Pacific railroad and of the Fremont, Elkhorn &

Missouri Valley railroad, put in force from points in the State of Nebraska a certain freight tariff upon corn and oats in the words and figures following, to wit:

"Chicago and Northwestern railway, Fremont, Elkhorn & Missouri Valley and Sioux City and Pacific railway.

Joint tariff on corn and oats, in car-loads, taking effect December 30, 1887, to Rochelle, Ill., when destined to New York, Boston, Philadelphia, Baltimore.

From—	Per 100 lbs.
Blair, Neb.....	11
Kennard, Neb.....	11

* * * * * * *

(Here follow rates from many other Nebraska points to Rochelle, Illinois.)

Prepaid. Waybill through to Rochelle, Ill., via Missouri Valley, at rates given above. For rates from Rochelle to Baltimore, Philadelphia, New York and Boston, see C. & N. W. G. F. D. No. 2604, November 25, 1887, amendments or subsequent issues.

H. R. McCULLOUGH,
G. F. A., C. & N. W. R.

K. C. MOREHOUSE,
G. F. A., S. C. & P. and F., E. & M. V. R's."

The declaration further averred that said freight tariff was never printed in type or published at any of the defendant's railroad stations in Iowa; that no copy thereof was filed with the Interstate Commerce Commission and that knowledge thereof was concealed from the plaintiff and other Iowa shippers; that said tariff remained in force until February 1, 1888, and that in the meantime large quantities of corn and oats were shipped thereunder from Blair and Kennard, Nebraska, to Rochelle, Illinois, and thence to Chicago at the rate specified therein, to wit, eleven cents per hundred pounds; that during the same period the plaintiff had a large amount of corn at Carroll, Iowa, for shipment to Chicago, which he was compelled to ship over the defendant's railroad, and did so ship it to Chicago, paying therefor freight charges at the rate of nineteen cents per hundredweight for carrying the same three hundred and ninety-five miles, the distance from Carroll to Chicago, which was somewhat less than the distance from Blair and Kennard, Nebraska, to Rochelle, Illinois. The plaintiff further averred that the fixing of the point Rochelle as
41 the terminus of the route under the aforesaid special tariff issued December 30, 1887, was a mere device to evade the law as Rochelle was not a grain market and had no elevators, and that said grain was intended to be and was in fact transported by the defendant to Chicago, Illinois, and was there sold on the market or delivered to connecting roads for eastern seaboard points; that the charge of nineteen cents per hundred pounds, which the plain-

tiff was compelled to pay for transporting corn from Carroll, Iowa, to Chicago was an unlawful charge under the interstate-commerce act, such as entitled plaintiff to recover damages, because an unlawful preference was thereby given to Nebraska shippers over Iowa shippers, and also because a greater compensation was demanded for a shorter than a longer haul, the shorter haul being included in the longer. The first count of plaintiff's declaration also contained an allegation that K. C. Morehouse, who was the general freight agent of the two roads, extending into Nebraska, had a brother who in January and February, 1888, was a copartner with persons who owned large quantities of corn at points in Nebraska on the line of the Fremont, Elkhorn & Missouri Valley railroad.

The second, third and fourth counts of the plaintiff's declaration were the same in substance as the first count, except that the plaintiff therein claimed damages on account of shipments of corn from other Iowa points to Chicago which he had made between the 30th of December, 1887, and February 1, 1888.

The fifth count of the declaration charged, in substance, that the Chicago & Northwestern Railway Company, combining with said K. C. Morehouse and other railroad companies operating roads east of Chicago to give a preference to grain shippers in Nebraska and to discriminate against grain shippers in Iowa, did put in force on February 17th, 1888, at all stations on the Fremont, Elkhorn & Missouri Valley railroad in Nebraska, between Blair and Skull Creek, a freight tariff on corn and oats, destined to New York and other seaboard points, whereby it did between February 17th and March, 1888, transport corn and oats from said Nebraska stations to New York for thirty-six and one-half cents per hundredweight, and to Philadelphia for thirty-four and one-half cents, and to Baltimore for thirty-three and one-half cents; that all of said Nebraska points were farther from New York, Philadelphia and Baltimore than the stations on the defendant's road in Iowa; that the through rate so established for said Nebraska points was not established for Iowa points on the line of the defendant's road or made known to Iowa shippers; that the tariff sheet in question was not filed with the Interstate Commerce Commission or printed or published as required by law; that during the period in question from February 17th to March, 1888, the plaintiff was compelled to pay on corn by him shipped from Carroll, Iowa, to New York, via Chicago, a local rate to Chicago of nineteen cents per hundredweight and from there to New York of twenty-seven and one-half cents, making a total of forty-six and one-half cents per hundredweight, as against
a rate of thirty-six and one-half cents per hundred allowed
42 to shippers residing at the aforesaid points in Nebraska.

The plaintiff averred in substance that the establishment of this latter rate was an unlawful discrimination against Iowa shippers as well as a violation of the long and short haul clause of the interstate-commerce act, by virtue of which he had sustained damages in the sum of about one thousand dollars.

The defendant company demurred to the declaration as a whole on the ground that the several counts of the declaration each showed

that the rate complained of therein from Nebraska points to the seaboard, was a joint rate established by two or more connecting railroads, while the rate exacted of the plaintiff was a local rate for shipments wholly upon the defendant company's own line, and that the rate so exacted from the plaintiff, it being a purely local rate, was not rendered unlawful by the establishment or existence of the joint through rate. The trial court sustained the demurrer, and the plaintiff declined to plead further, whereupon final judgment was entered in favor of the defendant. To reverse that judgment the plaintiff sued out *of* a writ of error.

Mr. C. C. Nourse (Mr. C. L. Nourse was with him on the brief), for plaintiff in error.

Mr. Lloyd W. Bowers (Mr. N. M. Hubbard was with him on the brief), for defendant in error.

THAYER, judge, after stating the case as above, delivered the opinion of the court:

This court held in the case of The Chicago & Northwestern Railway Company *v.* Osborne, 10 U. S. App. 430, 3 C. C. A. 347, 52 Fed. Rep. 912, which suit grew out of the establishment by the defendant company of the same freight rate that gave rise to the present action, that where two connecting carriers unite in putting in force a joint through tariff between given points, such joint tariff is not the standard by which the reasonableness of the local tariff on either line is to be determined. It was decided that where two connecting carriers unite in a joint tariff, they form practically a new and independent line, and that the joint rate established over such line may be made less than the sum of the local rates or even less than the local rate of either company over that part of its road constituting a part of the joint line, without violating the long and short haul clause found in the fourth section of the interstate-commerce law. The court was careful to limit the foregoing proposition by the proviso that under the first section of the interstate-commerce act all rates, whether local or joint, must be "reasonable and just." But it distinctly overruled the contention that a local rate between two points on the same road is necessarily unlawful because it is higher than the rate charged under a joint tariff for a much longer haul over a line which is composed in part of that portion of the road to which the local rate applies. In
43 the case of Tozer *v.* United States, 52 Fed. Rep. 917, it was also decided, that the fact that a railroad company charges a local shipper more for transporting property between two points on its road that it charges for the same services when the property transported is received from a connecting railroad, and is carried under a joint tariff established by the connecting carriers, is insufficient evidence to establish the charge of an undue preference or discrimination under the third section of the interstate-commerce act. The court remarked in substance that it did not follow, and that a jury was not warranted in finding, that an undue preference or advantage had been given because the local

rate was in excess of the carrier's share of the joint rate. While this latter ruling in Tozer *v.* United States was made by the circuit court, it is to be noted in passing that the case was brought to the circuit court on writ of error from the United States district court, and that the case was heard and determined in the circuit court by Mr. Justice Brewer and Judge Caldwell, both of whom had taken part in the decision of the case of The Chicago & Northwestern Railway Company *v.* Osborne, above cited. Moreover, both cases were under advisement, and the opinions therein were promulgated at about the same time.

Accepting the views thus expressed as sound and without undertaking to reconsider questions which have already been decided by this court after full consideration, we turn to consider the various points argued by counsel, bearing on the general question involved in the present suit, whether the petition filed therein stated a cause of action. The first, and perhaps the most important, contention of the plaintiff in error, seems to be, that the petition does not allege, or otherwise show, as was assumed by the demurrer, that on December 30, 1887, the defendant company, acting in concert with other connecting railroad companies, had put in force a joint through tariff between certain Nebraska points and the city of New York and other eastern cities, and that it does not show that the rate of eleven cents per hundred from Blair and Kennard, Nebraska, to Rochelle, Illinois, was a part of such joint through rate to the seaboard. It is said that the petition shows affirmatively that the tariff established on December 30, 1887, was a tariff to Rochelle, Illinois, only, and that the only parties to it were the Chicago & Northwestern Railway Company, the Fremont, Elkhorn & Missouri Valley Railroad Company, and the Sioux City & Pacific Railroad Company. With reference to this contention it is to be observed that the tariff sheet of December 30, 1887, set forth in the petition in the case at bar, was before this court in the case of The Chicago & Northwestern Railway Company *v.* Osborne, *supra*, and that it was there found and determined that by an agreement between the defendant company, the Fremont, Elkhorn & Missouri Valley railroad, the Sioux City & Pacific railroad and certain eastern companies, a joint through rate from certain Nebraska points to the seaboard was in fact established and put in force. It is true that in the case last cited we had before us other evidence than the tariff sheet of December 30, 1887, which may have aided somewhat in reaching the conclusion last stated, but we think that the tariff
44 sheet itself, which is set out in the petition, sufficiently shows that an arrangement or agreement existed between the several companies last named, whereby corn and oats were to be carried through from the Nebraska points named in the tariff sheet, to the eastern cities therein named, at a certain specified rate, and that the rate of eleven cents per hundredweight from Blair and Kennard, Nebraska, to Rochelle, Illinois, was a part of such joint through rate and not a local rate. The caption of the tariff sheet shows that the rate of eleven cents per hundred only applied when the grain was destined through to New York, Boston, Philadelphia and Balti-

more, and the memorandum at the foot of the sheet shows that the total through rate was to be ascertained, by the company's agents, by consulting the tariff sheet of November 25, 1887, and subsequent issues, for the rate from Rochelle to the eastern cities specified in the schedule. The inference is clear and irresistible that a specific joint through rate from the Nebraska points named in the tariff sheet, to the seaboard, had been established by the several companies above mentioned on December 30, 1887; that shippers of corn and oats from said points to the seaboard points named had the right to avail themselves of the joint through rate, and that the eleven-cent rate from Blair and Kennard to Rochelle was only applicable to such through shipments. Nor are we able to hold that the inference above stated arising from the language of the tariff sheet is sufficiently rebutted by the allegation of the petition, above recited, that "the fixing of said point Rochelle as the terminus of the route under the special tariff sheet of December 30, 1887, was a mere device to evade the law," etc. No facts are averred showing that the agreement for a joint through rate indicated by the tariff sheet in question was merely colorable, that no such agreement was ever made or acted under, and that the station agents along the line of the roads in Nebraska, had received private instructions, to disregard the direction to only allow the rate specified in the tariff sheet on through shipments to the seaboard. Without some such allegations as these, showing that no agreement was made by the several carriers for a joint through rate, or that the directions contained in the tariff sheet were secretly recalled and were not observed, we can attach no importance to the charge that it was a mere device to evade the law. That allegation standing by itself, and without the averment of facts to support it, is a mere conclusion of the pleader. Nor do the facts stated in that connection, that Rochelle was not a grain market, that the grain was not transshipped at Rochelle but was carried through over defendant's road to Chicago and was there delivered to the connecting roads for eastern seaboard points, serve to support it. For conceding that it was so carried through to Chicago and there delivered to the other connecting carriers, it may nevertheless have been carried on a joint through rate given to the Nebraska shippers such as the tariff sheet indicates. In other words the facts pleaded do not substantiate the charge that the pretended tariff agreement of December 30, 1887, "was a mere device to evade the law." We must
45 accordingly conclude that the petition does show the establishment and existence of a joint through rate, such as is assumed by the demurrer, and that the eleven-cent rate accorded to Nebraska shippers was not a local rate such as was paid by the plaintiff in error, but was a portion of the joint through rate. If such was not the meaning of the pleader, the fault lies with him in failing to make his plea more definite.

Other allegations found in the petition to which our attention has been particularly directed by counsel for the plaintiff in error, on the ground that they aid materially in the statement of a cause of action, are these: That the general freight agent of the Nebraska

roads, whose signature is appended to the rate sheet of December 30, 1887, had a brother who was a copartner of the owners of large quantities of grain in Nebraska, and that the rate sheet of December 30, 1887, was not filed with the Interstate Commerce Commission and was not published at Iowa stations on the defendant's road. Of the first of these allegations little need be said. It is not averred that the special tariff was put in force merely to favor a brother of the general freight agent in question, and it does not follow as a matter of law that the rate sheet in question was purely fictitious and colorable and that no joint through rate was in fact established, or if it was established, that Iowa shippers were discriminated against, merely because K. C. Morehouse, the general freight agent of the Nebraska roads, had a brother who was interested in corn and oats in Nebraska. We can attach no importance to this allegation because it is wholly immaterial and irrelevant.

Concerning the fact that the tariff sheet of December 30, 1887, was not published at the Iowa stations, it will suffice to refer to what was said on that subject by Mr. Justice Brewer in delivering the opinion of this court in Chicago & Northwestern Railway Company *v.* Osborne heretofore cited. The claim is not made, as we understand, that the defendant company cannot take advantage of the fact that the eleven-cent rate from Blair and Kennard to Rochelle was in reality, and as shown by the petition, a part of a joint through rate, merely because the tariff sheet of December 30, 1887, was not filed with the Interstate Commerce Commission. The purpose of the whole allegation touching the non-publication and non-filing of the rate sheet in question, seems to have been, to show that there was an actual intent on the part of the defendant company to discriminate against Iowa shippers; but it matters not what its intent may have been if the act committed was not an illegal discrimination, though intended as such. As the law stood when the transaction took place, the Interstate Commerce Commissioners undoubtedly had the right to determine whether they would make public the agreements between railroad companies, and joint tariff sheets, that were filed with them pursuant to the provisions of the sixth section of the act. Its language is: "Such joint rates, fares and charges on such continuous lines so filed as aforesaid shall be made public by such common carriers when directed by said commission, in so far as may, in the judgment of the commission, be deemed practi-
46 cable; and such commission shall from time to time prescribe the measure of publicity which shall be given to such rates, fares and charges, or to such part of them as it may deem practicable for such common carriers to publish." We are unable to say, therefore, that a complaint, otherwise clearly insufficient, is made good by a single allegation of the non-filing of the rate sheet, which was evidently inserted for the purpose of developing the intent of the defendant company, and for no other purpose so far as we are advised.

The only other proposition advanced in the argument which we deem it necessary to notice is this: That as the complaint made in the case of The Chicago & Northwestern Railway Company *v.* Os-

borne was for a violation of the long and short haul clause of the statute, whereas the petition in the case at bar also counts upon a violation of the third section of the law, therefore the latter case is not ruled by the former. Of this contention it may be said that while the present petition does charge an unlawful discrimination against persons and places, yet the only material fact averred to support the accusation is the fact that the defendant charged a local rate of nineteen cents per hundred for hauling grain from Carroll to Chicago, while eleven cents per hundred, being its proportion of a joint through rate to the seaboard, was the sum received by it for hauling grain a longer distance from Blair and Kennard to Rochelle, which latter point was a station on its road intermediate between Carroll and Chicago. It is manifest that the alleged disparity between the local rate and the defendant's proportion of the joint through rate is not sufficient, as a matter of pleading, to establish the charge of an "undue or unreasonable preference or disadvantage" under the third section of the act unless it follows, as a matter of law, that because of the alleged disparity in the two rates an undue or unreasonable preference was given to persons and places. Now in the case last above cited it was ruled, as we have heretofore stated, that if "two companies make a joint tariff over their lines, or any parts of their lines, such joint tariff is not the basis by which the reasonableness of the local tariff of either line is determined." More pointedly it was said in Tozer *v.* United States, where the sole question was one of undue preference and discrimination under section three of the act, that "if the joint through tariff of the two connecting roads is not a standard by which the local tariff of either can be declared in violation of section four, neither can it be the standard by which the question of undue preferences is determined under section three," and that the principle announced in the case of The Chicago & Northwestern Railway Company *v.* Osborne must control the decision of the case then in hand. In other words, it was held in both of the cases last cited that a question of undue discrimination must be determined by other considerations than the mere disparity that may exist between a local rate and a joint through rate, and that it never follows as a matter of law that an undue preference has been given to a person or locality, because a disparity is shown to exist between a local rate and a joint rate. We must accordingly overrule the
47 last-mentioned contention of counsel, that the petition in the case at bar stated a cause of action notwithstanding the previous rulings of this court in the case heretofore cited.

In conclusion it is only necessary to add that we have reviewed all of the points to which our attention has been invited by counsel for plaintiff in error with a view of showing that the petition stated a cause of action, with the result, that we are not able to say that the circuit court erred in sustaining the demurrer.

Its judgment is therefore affirmed.

Filed September 24, 1894.

48 *Judgment.*

And on the twenty-fourth day of September, A. D. 1894, in the record of the proceedings of said court is an entry of judgment in said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1894.

MONDAY, *September* 24, 1894.

E. M. PARSONS, Plaintiff in Error,
vs.
THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Defendant in Error. } No. 407.

In error to the circuit court of the United States for the southern district of Iowa.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of Iowa and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs, and that the Chicago and Northwestern Railway Company recover against E. M. Parsons the sum of twenty dollars for its costs herein and have execution therefor.

September 24, 1894.

Petition for Writ of Error.

And on the twenty-first day of November, A. D. 1894, a petition for writ of error was filed in the clerk's office in said cause in the following words, to wit:

49 Petition for writ of error.

E. M. PARSONS, Plaintiff in Error,
vs.
CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Defendant in Error.

To the United States circuit court of appeals for the eighth judicial circuit:

Your petitioner, E. M. Parsons, respectfully states that at the —— term, 1894, of said United States circuit court of appeals for the eighth judicial circuit there was tried a cause then and there pending, wherein E. M. Parsons was plaintiff in error and The Chicago and Northwestern Railway Company was defendant in error, in which judgment was then and there rendered affirming the judg-

ment of said United States circuit court in favor of said Chicago and Northwestern Railway Company and against your petitioner.

And your petitioner has filed herewith in the office of the clerk of said United States circuit court of appeals for the eighth judicial circuit an assignment of errors in said cause, and now brings here his supersedeas bond in the sum of five hundred dollars, with good and sufficient surety, conditioned as required by law and the rules of said United States circuit court of appeals.

Wherefore your petitioner prays that a writ of error be granted, directed to the judges of the circuit court of appeals for the eighth judicial circuit, commanding that the record in said cause be certified to the Supreme Court of the United States, and that a citation issue as provided by law, and that a stay of proceedings be ordered until the said errors shall have been heard and determined.

C. C. NOURSE,
Attorney for E. M. Parsons, Pl'tff in Error.

50 A writ of error is hereby allowed, as prayed for in the foregoing petition, this 10th day of Nov. 1894.

DAVID J. BREWER,
Associate Justice Sup. Ct. U. S.

Endorsed: E. M. Parsons *vs.* Chicago & Northwestern Railway Company. Petition for writ of error to Supreme Court U. S. Filed Nov. 21, 1894. John D. Jordan, clerk. C. C. & C. L. Nourse, att'ys for Parsons.

Assignment of Errors.

And on the twenty-first day of November, A. D. 1894, an assignment of errors was filed in the clerk's office in said cause in the following words, to wit:

United States Circuit Court of Appeals for the Eighth Judicial Circuit.

E. M. PARSONS, Plaintiff in Error,
vs.
THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY, Defendant in Error.

Assignment of errors.

The plaintiff in error, E. M. Parsons, respectfully states that there is manifest error on the face of the record in the above-entitled cause in the following particulars, to wit:

1. The circuit court of appeals erred in affirming the judgment of the United States circuit court for the southern district of Iowa, central division, and for disallowing the errors assigned in said cause.

2. The circuit court of appeals erred in holding that there was no

error in sustaining the demurrer to plaintiff's amended peti-
51 tion and to the second, third, fourth, fifth, sixth, and seventh counts thereof and to each of said counts.

3. The circuit court of appeals erred in holding that the second count of the amended petition of plaintiff set forth and alleged no cause of action.

4. The circuit court of appeals erred in holding that the said third count of the amended petition did not state a cause of action.

5. The circuit court of appeals erred in holding that the said fourth count of the amended petition did not state a cause of action.

6. The circuit court of appeals erred in holding that the said fifth count of the amended petition did not state a cause of action.

7. The circuit court of appeals erred in holding that the said sixth count of the amended petition did not state a cause of action.

8. The circuit court of appeals erred in holding that the said seventh count of the amended petition did not state a cause of action.

9. The circuit court of appeals erred in holding that said amended petition was insufficient in law for the reason that the rate from Nebraska points to eastern seaboard points was made under a joint tariff arrangement between several different railway companies, and because that the shipments by plaintiff were upon defendant's road alone and the charge made was for a local rate over its own line.

10. The circuit court of appeals erred in holding the amended petition insufficient in law under the fourth section of the act of Congress, and that it was insufficient under the third section of the act of Congress of the interstate-commerce act, and that the unlawful discriminations charged in the several counts of said petition were not prohibited by law.

C. C. NOURSE.

Endorsed: E. M. Parsons *vs.* Chicago & N. W. R'y Co. Assignment of error. Filed Nov. 21, 1894. John D. Jordan, clerk.

52 *Bond on Writ of Error.*

And on the twenty-first day of November, A. D. 1894, a bond on writ of error was filed in the clerk's office in said cause in the following words, to wit:

Know all men by these presents that E. M. Parsons, as principal, and W. T. Minchen, as surety, hereby acknowledge themselves to be indebted to the Chicago and Northwestern Railway Company in the sum of five hundred dollars, lawful money of the United States; for the payment whereof, well and truly to be made unto the said Chicago and Northwestern Railway Company, they hereby bind themselves and their legal representatives firmly by these presents.

But upon the following conditions: Whereas the said E. M. Parsons has sued out a writ of error to review the judgment and decisions of the United States circuit court of appeals for the eighth judicial circuit in a cause therein pending, wherein the said E. M.

Parsons is plaintiff and the said Chicago and Northwestern Railway Company is defendant:

Now, therefore, if said E. M. Parsons, plaintiff in error, shall prosecute his writ of error to effect and answer all damages, interest, and costs if he fails to make his said plea good, this obligation to be null and void; otherwise to be of full force and effect.

Signed this 27 day of October, 1894.

E. M. PARSONS.
W. T. MINCHEN.

Bond approved this Nov. 10th, '94.
D. J. BREWER, *Justice.*

STATE OF IOWA, *Carroll County,* } *ss:*

I, J. W. Kennebeck, clerk of the district court within and
53 for said county, do hereby certify that the surety whose name is subscribed to the foregoing bond is, in my opinion, *is* good and sufficient for the sum therein named, and I, as said clerk, would accept and approve the same if presented to me in this county for the purposes therein set forth.

[SEAL.] Witness my hand and seal of said court this 27th day of Oct., A. D. 1894.

J. W. KENNEBECK,
Clerk D. C.

Endorsed: E. M. Parsons *vs.* Chicago & Northwestern Railway Co. Bond. Filed Nov. 21, 1894. John D. Jordan, clerk.

Stipulation as to Record for Supreme Court.

And on the twenty-first day of November, A. D. 1894, a stipulation as to preparation of record for Supreme Court was filed in the clerk's office in said cause in the following words, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1894.

E. M. PARSONS, Plaintiff in Error, *vs.* CHICAGO AND NORTHWESTERN R'Y CO.	No. 407. In Error to the Circuit Court of the United States for the Southern Dist. Iowa.

It is hereby stipulated that in certifying the record on return to the writ of error to the Supreme Court of the United States in the case of E. M. Parsons, pl't'ff in error, *vs.* The Chicago & Northwestern Railway, def't in error, it shall be necessary only that the clerk of the circuit court of appeals shall certify only the within copy of

printed record upon which the case was heard in the circuit
54 court of appeals, with such record entries as appear of record in that court, & assignment of errors filed therein, with copy of this stipulation.

C. C. & C. L. NOURSE,
Counsel for E. M. Parsons.
LLOYD W. BOWERS,
Of Counsel for Chicago & Northwestern R'y Company, Def't in Error.

Endorsed: No. 407. E. M. Parsons, pl'ff in error, *vs.* Chicago and Northwestern Railway Company. Stipulation as to record for Supreme Court. Filed Nov. 21, 1894. John D. Jordan, clerk.

Writ of Error.

And on the twenty-first day of November, A. D. 1894, a writ of error was filed in said cause, the original of which, with the clerk's return endorsed thereon, is hereto attached and herewith returned.

55 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between E. M. Parsons, plaintiff in error, and The Chicago & Northwestern Railway Company, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the tenth day of November, in the year of our Lord one thousand eight hundred and ninety-four.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

55½ [Endorsed:] (12.) No. 407. E. M. Parsons, pl'ff in error, *vs.* Chicago and Northwestern Railway Company. Original writ of error. Filed Nov. 21, 1894. John D. Jordan, clerk.

Return to Writ.

UNITED STATES OF AMERICA, *Eighth Circuit,* } *ss:*

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States from the United States circuit court of appeals for the eighth circuit a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In witness whereof I hereto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, Missouri, this 27th day of November, A. D. 1894.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

56 *Citation.*

And on the twenty-first day of November, A. D. 1894, a citation was filed in said cause, the original of which, with the acknowledgment of service endorsed thereon, is hereto attached and herewith returned.

57 UNITED STATES OF AMERICA, *ss:*

To the Chicago & Northwestern Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, wherein E. M. Parsons is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this tenth day of November, in the year of our Lord one thousand eight hundred and ninety-four.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

57½ [Endorsed:] (13.) No. 407. E. M. Parsons, pl'ff in error, *vs.* Chicago and Northwestern Railway Company. Original citation. Filed Nov. 21, 1894. John D. Jordan, clerk.

On this 16 day of November, in the year of our Lord one thousand eight hundred and ninety-four, personally appeared —— —— before me, the subscriber, and makes oath that he delivered a true copy of the within citation to —— ——.

—— ——.

Sworn to and subscribed the — day of ——, 189–.

—— ——.

We acknowledge service of the within citation this 16th day of November, A. D. 1894.

LLOYD W. BOWERS,
Of Counsel for The Chicago & Northwestern Railway Co., Def't in Error.

58 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing pages, from one to 57, inclusive, contain full, true, and complete copies of all the pleadings, proceedings, and record entries, as stipulated by the parties, including the opinion of said circuit court of appeals, in a certain cause wherein E. M. Parsons was plaintiff in error and The Chicago and Northwestern Railway Company defendant in error, No. 407, May term, A. D. 1894, as full, true, and complete as the originals of the same now remain on file and of record in my office.

I further certify that the original writ of error and the original citation, with the acknowledgment of service endorsed thereon, are hereto attached and herewith returned.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of St. Louis, Missouri, in the eighth circuit, this 28th day of November, A. D. 1894.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Endorsed on cover: Case No. 15,745. U. S. circuit court of appeals, eighth circuit. Term No., 198. E. M. Parsons, plaintiff in error, *vs.* The Chicago and Northwestern Railway Company. Filed December 6, 1894.

167-447

JAN 8 1897

JAMES H. McKENNEY, CLERK

Supreme Court of the United States.

JANUARY TERM 1897.

NO. 198.

E. M. PARSONS, PLAINTIFF IN ERROR.

vs.

THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLANT.

C. C. & C. L. NOURSE, *Attorneys for Plaintiff in Error.*

GEO. A. MILLER PRINTER, DES MOINES.

Supreme Court of the United States.

JANUARY TERM, 1897.

NO. 198.

E. M. PARSONS, PLAINTIFF IN ERROR.

vs.

THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLANT.

STATEMENT.

This is a suit brought in the Circuit Court of the United States for the Southern District of Iowa, against the defendant Railway Company for damages upon an alleged violation by defendant of the third and fourth sections of the Act of Congress approved February 4, 1887, commonly known as "The Inter-State Commerce Act."

The questions arising are presented upon demurrer by defendant to the several counts of an amended and substituted petition, which demurrer was sustained by the Cir-

cuit Court upon the authority and supposed applicability of the opinion of the Circuit Court of Appeals in the Osborne case, reported in 52 Federal Reporter, 917.

The plaintiff electing to stand upon his petition, final judgment was rendered for costs and a writ of error taken to the Circuit Court of Appeals and judgment affirmed by that court, from which ruling a writ of error was taken to this court.

The questions for the determination of this court therefore, arise upon the allegations of the several counts of the amended and substituted petition, and whether the same set forth any cause of action against the defendant. The petition avers that the defendant was a common carrier operating a line of railroad from the City of Chicago to points through the State of Iowa and Nebraska, known as the Chicago and Northwestern, the Sioux City and Pacific, and the Fremont, Elkhorn and Missouri Valley Railways, all under one comon management and control. That prior to the 30th day of December, 1887, the freight charges established by defendant over said line of road, from points in Nebraska to Turner, Rochelle and Chicago, or points east of Chicago, had uniformly been higher than from points in Iowa by reason of the greater distance and the greater cost of service, but that on the 30th day of December, 1887, for the purpose of giving an unlawful preference to shippers of grain in Nebraska, and to discriminate against plaintiff and other shippers of grain from points in Iowa, the defendant issued a certain freight tariff, upon which they transported corn from Nebraska to Turner, Rochelle and Chicago for eleven and twelve cents per hundred, a distance of 480 miles and demanded and received from plaintiff at the same time, nineteen cents per hundred for transporting corn from Carroll

to Chicago, a distance of only 395 miles, the same being for a like contemporaneous service over the same line in the same direction, under substantially similar circumstances. The petition contains other material allegations that will be referred to more particularly hereafter.

The second count of the substituted petition sets forth a like cause of action on account of corn shipped from Correctionville, Iowa, to Chicago, for which defendants demanded and received twenty-one cents per hundred.

The third count is of the same tenor on account of shipments from Mapleton, a distance of 378 miles for which defendant demanded and received twenty-one cents per hundred.

The last count of the petition repeats the general averments of the former counts, but is based upon a through tariff from points in Nebraska to New York and other seaboard points. It avers that on the 17th day of February, 1888, the defendant put in operation and shipped grain from points in Nebraska to New York, at a through rate of thirty-six and one- half cents per hundred, and refused the same rate to plaintiff and shippers from Iowa points and compelled them to ship on two local rates, one for nineteen cents to Chicago and the other of twenty-seven and one-half cents to New York, making an aggregate rate of forty-six cents per hundred for the shorter distance. For the other material allegations of this count, reference is here made to the record, pages 17 to 19, inclusive.

The Osborne case, decided by the Circuit Court of Appeals, (52 Federal Reporter, Supra), has a peculiar history. It was tried originally in the Circuit Court for the Southern District of Iowa, before Judge Shiras, upon various issues set up in defendant's answer, the chief of

which was that the special rate of eleven cents from Nebraska points was given for the purpose of meeting an alleged competition at points on the Elkhorn road in Nebraska. All of the defenses set up by defendants were unsuccessful and the jury found a verdict in favor of the plaintiff, upon which judgment was rendered by the Circuit Court. The defendant then sued out a writ of error to the Circuit Court of Appeals and the cause came on for hearing at the October term, 1891, of that court at St. Louis, and was there submitted, both upon printed briefs and oral argument. The errors assigned related to the charge of the circuit court, and the refusal of that court to give certain instructions to the jury, requested by defendant. The principal points in the charge of Judge Shiras to the jury upon which errors were assigned, were as follows:

The defendant claims that the circumstances and conditions at the points in Nebraska named in the tariffs mentioned in the petition were substantially different from those at Scranton and other stations in Iowa on its main line, and that this difference justified the railway company in transporting corn and oats from Nebraska points at a lower rate than from such Iowa stations, and evidence has been introduced tending to support the defendant's contention. This is a question of fact to be decided by the jury from all the evidence, and if they shall be satisfied from the testimony that the circumstances and conditions were not substantially similar, that is a legal excuse for the defendant to charge a greater compensation for a shorter than for a longer distance, although Scranton is on the same line and in the same direction; and if they so find, then the defendant has not been guilty of unjust discrimination."

8. The substance of the plaintiff's complaint is that the defendant made a rate from Nebraska points to the seaboard cities on corn and oats which was lower than the rates to the same seaboard cities from Scranton and other points in western Iowa, and that shipments from Nebraska and Iowa were for a like and contemporaneous service and under substantially similiar circumstances and conditions. The defendant claims that the circumstances and conditions were not substantially similiar, and, therefore, the Nebraska rate as shown by the testimony

does not constitute a violation of the interstate commerce act which prohibits a charge of a greater rate for a shorter haul over the same line in the same direction.

"Whether the circumstances and conditions of the haul are substantially alike is a question of fact for the jury to decide from all the testimony. Evidence has been introduced tending to show that a secret rate was made from the Nebraska points where the tariffs in controversy were put in force, whereby corn and oats were diverted from the lines of the Elkhorn and of the defendant's road to other lines of railway by way of St. Louis and Beardstown, Illinois. Mere competition alone between rival and competing lines of railway is not sufficient to create the dissimilar circumstances and conditions contemplated by the Interstate Commerce Act, but the competition must be of such a nature as to be destructive of legitimate competition. If you find from the testimony that the open, published rate on corn and oats from Nebraska points to the seaboard cities by way of the defendant's lines to Chicago, and by way of St. Louis and Beardstown were substantially the same, and that by a secret or manipulated rate parties shipping by way of St. Louis and Beardstown were enabled to pay a sum substantially greater per bushel for corn and oats, and that thereby the corn and oats on the line of the Fremont, Elkhorn & Missouri Valley Railroad was diverted from the route by way of Chicago so as to destroy legitimate competition, the question is submitted to you whether the defendant was justified under the law in putting the tariff in force in Nebraska, and not putting the same in force at Scranton and other Iowa points.

It was claimed that the court erred in giving to the jury the following portions of the charge:

"Evidence has been introduced in the case, upon which the court has been asked to submit to the jury, for your determination, as a matter of fact, whether the defendant railway company was not justified in making the reduction of rates by reason of the fact that it appeared, as it is claimed under the evidence, that there had been what was called a secret cut rate put in operation in Nebraska which affected business upon the line of the Fremont, Elkhorn & Missouri Valley and the Chicago & Northwestern Railway, the result of this better rate being to cause quite a large portion of the business that would naturally be tributary to the Chicago & Northwestern line to go south by way of St. Louis and Beardstown, and in that way through St. Louis and those southern points to the eastern seaboard. Under the ruling of the court upon the question of law, although a rate of that kind may have existed, it is the view of the court that that question cannot be determined by this court and jury. The consideration of questions of that kind, of the right of the railway company to be excused from the duty and obliga-

tion that is placed upon it by the fourth section of the interstate commerce law, is by the express terms of the law itself, conferred upon the interstate commerce commission. As you know, there is a body of commissioners provided for by this interstate commerce act, and the fourth section of this act, by its express terms, in a proviso that is therein contained, places upon the commission the duty and gives them the authority to investigate and determine whether there are such facts and circumstances surrounding a railroad at a given time as would justify the commission in authorizing the railway company to charge a greater sum for a shorter than for a longer haul over the same line in the same direction, under otherwise substantially similar circumstances. In the view that the court takes of it, this court and jury cannot determine that question, which, by the law, the commission is authorized to determine. Whether the railway company was justified by a cut rate, making what was called in argument 'illegitimate competition,' and circumstances of that kind which grow out of the handling and management of the railroad business of the country, by other competing lines, and its effect upon the business of the defendant company, in the judgment of the court, are questions that cannot be committed to you."

"Now, then, if the railway company had been authorized by the commission to do that then they could plead and prove that fact, and it would then be the duty of the court to instruct the jury that that would justify the railway company in making the larger rate for the shorter distance; but no such action has been taken by the interstate commerce commission; they have not been called upon to act, and they have not authorized the railway company to charge a greater sum for the shorter than for the longer distance. Under the circumstances I have detailed before you, as I view it, this court and jury cannot authorise the railway company to make such charge or justify it after it has been done."

After the cause had been fully submitted at St. Louis, the Railroad Company dismissed their writ of error and immediately sued out another writ of error to the Circuit Court of Appeals, upon which they finally obtained another hearing at St. Paul, where the court was differently constituted than at St. Louis, Justice Brewer presiding. Neither upon the trial in the Circuit Court or upon the hearing at St. Louis was there any such suggestion of any such question as that upon which Justice Brewer dis-

posed of the case in the final hearing before the Circuit Court of Appeals.

At the hearing at St. Paul before Justice Brewer and his associates then constituting the Circuit Court of Appeals for the Eighth Circuit, Mr. Gowdy, the distinguished counsel for the Railroad Company, filed a printed brief of 72 pages, upon the day that the cause was called for argument, in one paragraph of which the doctrine upon which the case was disposed of by Justice Brewer was darkly hinted at, but so obscurely that it failed to attract the attention of the counsel for the plaintiff at the time. The opinion in the Osborne case was therefore upon a point never raised upon the trial of the case in the Circuit Court and never argued before the Circuit Court of Appeals.

The amended and substituted petition in this case was prepared in view of the opinion in the Osborne case, and was intended to present the questions fairly and fully upon appeal to the end that there might be no confusion between the idea of "a pro rata share of a through rate" and a charge for the short haul that exceeded the through rate, and an absolute refusal of the Railroad Company to afford intermediate points the benefit of the aggregate charge of the through rate.

ARGUMENT.

The first question we present, arises upon the allegations of the petition, that the three divisions of the railroad from points in Nebraska to Chicago were all under a

"COMMON MANAGEMENT OR CONTROL."

The petition alleges as follows:

That the defendant is a body corporate, organized and existing under the laws of the state of Illinois, and a citizen of the said state, and doing business in the State of Iowa, as hereinafter set forth, as a common carrier of freight and passengers, and owns and operates, and did own and operate at the date hereinafter set forth, as such common carrier, a certain line of railroad from the City of Chicago, in the State of Illinois, to Missouri Valley and Council Bluffs, in the State of Iowa, and at the same time the defendant owned the majority of the stock and by the same general officers and board of directors controlled and operated the Fremont, Elkhorn & Missouri Valley Railroad, and the Sioux City & Pacific Railroad, which roads connected with the Chicago & Northwestern Railway at Missouri Valley and extended westward to points in the State of Nebraska.

The opinion in the Osborne case is based on the theory that these three corporations were distinct. The petition in that case alleged that the Northwestern was the lessee of the other tracks. The case was tried upon the issue of fact and this allegation turned out to be contrary to the fact. The evidence disclosed ownership and control as averred in this case, but the judgment having been in Osborne's favor in the Circuit Court, there was no appeal upon his behalf, hence, the question here made was not noticed or determined by the Circuit Court of Appeals in that case.

Justice Brewer in his opinion in the Osborne case recognizes that two or more roads may constitute one line by "joint arrangement," as does this court also in the case of the Cin. N. O. & Texas Pacific vs. Inter State Commerce Commission, 162 U. S., 184.

Our contention is that the first section of the Inter State Commerce Act subjects all lines of transportation to the provisions of the third and fourth sections thereof, where they are under the same management and control,

as well as where they are made one by "joint arrangement."

Justice Brewer in the Osborne case says:

"We do not intimate that the two companies with a joint line can make a tariff from Turner to Cleveland higher than a tariff from Turner to Buffalo, or any intermediate point between Cleveland and Buffalo, for when two companies by their joint tariff, make a new and independent line, that new and independent line may become subject to the long and short haul clause."

But in the application of this rule in the Osborne case, the opinion is at fault, we think, in holding that any company owning a road at either end of the line thus formed might for the purpose of levying tribute upon intermediate non-competitive points, regard itself as part of the line or not, at pleasure. This was attempted in the Social Circle case, 162 U. S., Supra. The Georgia road was at the other end of the line from the place of shipment and by contract made itself part of a through line from Cincinnati when carriages were to be shipped to Augusta, but when the carriages were to go to Social Circle only, a point on the Georgia road intermediate, they refused to be a part of the new line, but shipped on local rates from the eastern end of their road to Social Circle.

The question we make first is, whether the Northwestern road, through its board of directors and general officers, and its ownership of the controlling stock in these short roads, could operate the line thus under its control, and claim to violate the spirit, purpose and letter of the law with impunity.

Section 1 of the Act of Congress provides, "That the provisions of the Act shall apply to any common carrier or carriers engaged in the transportation of passengers or property, under a common control, management or arrangement, for a continuous carriage."

This court in the case before cited, holds that the fourth section of the Act of Congress applies to each part of the line of road where the roads are operated under a "common arrangement" and that the road at the end of the line thus formed could not for the purpose of charging an an intermediate point a higher rate, claim to disintegrate at pleasure and cease to be a part of that line for the purpose of avoiding or evading the law. An "arrangement" may, however, be limited to certain purposes or certain classes of freight, but a joint control or management can in its very nature have no such limitations. It is for all purposes of freight on any part of the line, one line, if under one management or control—you cannot segregate the line and call any part of it a separate line for the purpose of "local tariff" any more than if each part belonged in its entirety, to the same corporation. The statute purposely uses the words "management or control" instead of "ownership."

The words, management or control, were used in this Act in view of the fact that the consolidation of routes of travel are not effected always by a merger of ownership in one body corporate, but on the contrary the "big fish" swallows the "little fish" simply by controlling it through a purchase of a controlling interest in its stock, and electing a common board of directors and general officers, to manage it in connection with the original road. Where this is done, the law subjects the entire line thus managed and controlled to the provisions of the act precisely as if the line was owned by one corporation. To hold otherwise would, we suggest, be to encourage and promote evasions and impair the efficiency and usefulness of the act.

We next call attention to the question as to whether or

not two or more roads may combine to establish a through rate from distant points and yet any part of the combination charge a local rate for a shorter distance on its own road

"GREATER THAN THE COMBINED RATE."

In the argument of this question an effort is constantly made to confuse this proposition with the question of a proportionate rate or a local rate in proportion to a division of the through rate. There is no such question in this case. We do not contend for a rate in proportion to the through rate, but we do contend that a local rate that is greater than the entire through rate is a violation of both the second and third sections of the Act of Congress. We contend that the opinion of the Circuit Court of Appeals in the Osborne case was in this respect erroneous and subversive of the spirit and letter of the Act of Congress. That opinion states by way of illustration, the following proposition:

"That where two companies owning a connecting line of road, unite in a joint through tariff, they form with the connected roads practically a new and independent line; neither company is bound to adjust its own local tariff to suit the other, nor compelled to make a joint tariff with it. It may insist upon charging its local rates for all transportation over its line. If, therefore, the two companies by agreement make a joint tariff over their lines, or any parts of their lines, such joint tariff is not the basis by which the unreasonableness of the local tariff of their line is determined. To illustrate: On the defendant's road the distance from Turner to Chicago is thirty miles; on the Lake Shore line from Chicago to Cleveland it is two or three hundred miles. The defendant company may charge 15 cents for transporting grain the thirty miles from Turner to Chicago, providing that be in fact only a reasonable charge for the service, although the Lake Shore company charges no more for transporting it from Chicago to Cleveland; and the fact that the rate on each line is 15 cents for the distance named will not prevent the two companies from making a joint tariff for grain shipped from Turner to Cleveland for 12 cents, less than the local tariff of either.

Now we agree with all the court says here except the last proposition, to-wit: That 15 cents may be charged for the thirty miles and only twelve cents for the 230 miles.

The court further says:

The denunciation of the fourth section is against each separate common carrier for its violation of the long and short haul clause *on its own line*.

The opinion uses the words "its own line," the statute says the "same line."

Upon this construction of the fourth section of the inter-state commerce law, the case of the plaintiff in the Osborne case upon the first count of his petition was disposed of, and the court concluded its opinion by saying that the jury should have been instructed to find a verdict for the defendant.

This court will no doubt take judicial notice of the fact, of which Congress was fully advised, to-wit: that the transportation by the long haul, is almost uniformly done by a combination of roads by means of joint tariffs. To confine the operation of the long and short haul clause to only one road in the combination is simply to make it mean practically nothing, except in those few cases in which one company owns a long line of road, and then the act would simply work gross injustice to that road. For instance, take any one of the roads east of Chicago, say the Lake Shore road from Chicago to Buffalo. By making the fictitious point of Turner Junction, thirty miles west of Chicago, and making a joint rate with the Northwestern from Turner Junction to Buffalo, freight may be carried from Turner Junction through Chicago to Buffalo for any price that the combination may see fit, without at all affecting the rates from Chicago to Buffalo

or any intermediate point between Chicago and Buffalo, if such construction of the law shall prevail.

Take again another illustration. The Baltimore & Ohio Railroad Company operates its own road from Chicago to Baltimore. A competing line to this road is made up of the Lake Shore to Buffalo, the New York Central to New York, and the Pennsylvania to Baltimore. Under the construction of the fourth section of the inter-state commerce law given to it in the Osborne case, the Baltimore & Ohio road cannot charge more for freight from any intermediate point on its road than it does for the whole distance, and in order to maintain its local rates it is compelled to maintain its through rate. But not so with the roads that form the competing line. They may wholly disregard the through rate in fixing their local charges because, acording to that opinion, they can be part of a line and yet not be of "the same line." The result of such a construction would be to destroy that very competition which it is the policy of the law to preserve, and to handicap every company that owns a line of road extending through many states or compel them to resort to the subterfuge that the Chicago & Northwestern Railway Company has resorted to in this case, to-wit: not to own the road but to own the stock and put the parts under a common control.

Under such a construction of the fourth section of the act, the Union Pacific Rairoad, owning a fracion of a mile of road in Iowa, may enter into a combination with any one of the four roads extending from Council Bluffs to Chicago and take freights through to Chicago for any price they may jointly agree upon, without at all affecting the local rates on that road between Council Bluffs and Chicago, while the other three roads between Council

Bluffs and Chicago could not meet the competition, for if they reduced their rates between Council Bluffs and Chicago they must at the same time reduce their local rates at all intermediate points so as not to exceed the through rate. This construction would place it in the power of the Union Pacific to destroy the through business of any road or roads between Council Bluffs and Chicago that it chose to disfavor. And so, all over the country, what was intended by the law for the protection of the stockholder against unreasonable and ruinous rate wars, and the protection of the intermediate shipper as well, would by such an interpretation of the law be made the very means for the ruin of both.

We submit further that the opinion in the Osborne case is not consistent with the purpose of the law as conceded in that case.

The opinion concedes that prior to the enactment of the inter-state commerce law, common carriers by railroad could not charge unreasonable rates for transportation, and that the burden of proving the charges unreasonable was with the party aggrieved, but that all experience had shown that such burden of proof was onerous and therefore seldom undertaken, the party aggrieved preferring to submit to the overcharge rather than go to the expense of contesting it. Hence, that opinion says, the effort of the state and nation to establish limits of charges and means of evidence of *easy and accurate ascertainment.* There can be no question about this being the reason and origin of the long and short haul clause contained in section 4 of the act. In other words, the charge for the long haul was made the criterion by which to judge of the reasonableness of the charge of the short haul, in that the former should not exceed the latter. Not that a pro-

rata share of it should be a criterion, but that if the short haul exceeded the long haul, that fact should be evidence of its unreasonableness.

When this section of the bill was under consideration in the House of Representatives, Mr. Hopkins explained its meaning as follows (page 790, Congressional Record, January 18):

The construction which has been placed on section four by the conference committee of the senate avoids all the difficulties raised by gentlemen who oppose the bill on account of its provisions relating to the so-called long and short haul. That construction will secure to the farmers and shippers of Illinois and the west as favorable rates for through freights, otherwise known as the long haul, as they have now, while under the provisions of the bill, all shippers at intermediate points on the line of the road, *or roads forming the line which the long haul shipments are made*, will be protected from unjust discriminations or extortions. The gentleman from Georgia (Mr. Crisp) who presented to the house this afternoon the reasons which actuated the conference committee in agreeing upon the bill in the form we are now considering it, spoke of the disastrous results to the commerce of the country and shippers and the people generally, from a war of rates between two or more of the great trunk line railways at competing points, such as Kansas City, Omaha or Chicago, for through freight to New York City or some other seaboard city. What the railroads lose by such wars at these terminal points, it is claimed are imposed upon the people and shippers at intermedaite points on the line of the road, between their eastern and western termini, so that the people are the ones upon whom finally the great burden falls. Now by this section of the bill provision is made that the charge for the shorter haul on such a line, shall not be more than for the longer haul, except in special cases, and whatever the rates at the terminal points of such competing roads may be reduced to, *all the intermediate points* will get the benefit of such reduction. This fact will serve as a most effective check upon the hostilities of competing railroads and will secure fair and uniform rates.

Mr. Burrows (January 20, page 864, Congressional Record), spoke as follows:

The long and short haul provided for in the fourth section is objected to as working a hardship upon through shippers. Let us examine this

a moment. The bill does not undertake to fix through or local rates for any road. It is not a castiron arangement. It leaves the railway managers perfectly free to fix their own through charges, governed only by the common law that they shall be reasonable. Fix your own through rates, it says to the railroad, but with this simple understanding, that these through rates shall be a *guide for and govern your shorter haul* If there was but a single railroad line running from Chicago to New York, there would be no objection to this provision of the bill. In such cases, there being no competition, the shipper at Chicago would be charged a reasonable rate, say $25 for carrying a horse, we will say, from Chicago to New York, a reasonable and fair rate for that distance, and a shipper at South Bend, under this bill, in such case, would be charged not to exceed $25 for a like service. Why, Mr. Fink himself testified before the Cullom committee that this provision is substantially adopted by the railroads in practice. Here is what he says: "The local charge can always be properly regulated when proper through tariffs are maintained; hence the first object should be to secure the maintenance of properly adjusted through tariffs that are reasonable to the public and to the railroads. This done, there will be no difficulty in adjusting local tariffs and preventing unjust discriminations.

Mr. Burrows continued:

Now the shipper at South Bend says that if $15 for the carriage of a horse from Chicago to New York is a reasonable and fair rate, and it must be because you have adopted it, then the charge of $25 from South Bend to New York for like service is an extravagant and extortionate charge. If $15 is a reasonable paying rate from Chicago to New York, then certainly $15 is a paying rate from South Bend to New York. This bill steps in and enforces the reasonable rate from South Bend to New York and gives the shipper the benefit of the rate from Chicago established by wholesome competition.

Mr. Burrows further says:

When the railroad companies come to understand that their short haul rates are governed by the rate fixed for the through traffic, they will carry competition at competing points only to the limit of reasonable and fair compensation.

He further says:

The bill will prevent the through freight being carried at a loss and loading the burden of the loss on the shippers along the line, and the shippers along the line ought not to be compelled to carry this burden.

We do not propose to examine these debates in full in the body of our brief, but have set out in an appendix hereto full extratcs from the speeches of a number of Senators and Representatives with comment on the same, that the court may examine them if it should conclude that these discussions ought to have any controlling influence in the construction of the law. It is our own opinion that it is not always a safe rule to interpret a law by the contemporaneous discussions of those who frame it.

A better rule of interpretation, we think, is to consider the language of the act in the light of the evil that the Act was intended to remedy. These debates, beyond question, disclose the fact that the great evil that the law was intended to remedy was the custom of railroads to engage in rate wars at competitive points that were ruinous to their own interests, and the losses thus entailed on the stockholders were made up by inflicting extortionate rates on intermediate and non-competitive points.

This court canot ignore the fact also that every one else knows, that these rate wars were made by two or more roads combining to make a rate between competitive points, and at the same time two, three or more other roads combining to make a rival line, and the losses thus sustained were made up by each road in the combination demanding of the helpless shippers at non-competitive points exorbitant local charges. These were the evils this fourth section was intedend to remedy, and a construction that defeats this evident purpose of the act is simply to relieve the roads of that governmental control which they have resisted from the beginning, and to sacrifice both the interests of the public and of stockholders to the ambitions and passions of railroad managers.

The Inter-state Commerce Commission appointed under

the law to secure its proper administration, as early as 1887 had occasion to decide the very question here presented to the court, and rendered an opinion, that we believe was, until the Osborne decision, generally received as the corect interpretation of this fourth section of the act. The opinion is reported in Vol. 1, Int. S. C. Rep., 576. The case was that of the Boston A. R. R. vs. Boston & L. R. R. Co. The commissioners say:

> It is contended on the part of the defendants, that they do not nor does either of them, violate the fourth section of the act to regulate commerce, because the shorter hauls for which the greater charges are made are not over the same lines as the longer hauls for which the charges are less. * * * We do not think the argument sound. Without pausing now to inquire what was meant by the words, "under a common control, management or arrangement," etc., or whether these words have any application at all to carriers, wholly by railroad, we have no difficulty in holding that if the defendants join in making the tariff, which constitutes the lesser charge on the longer haul, while one or more of their number make the greater charge on the shorter haul, the case is within the fourth section and those who make such greater charges are called upon to justify it. * * * "Any common carrier" is as much restrained when it unites with one or more others in making the long haul charge as when it makes such charge independently. Nor have we any doubt as to the meaning of the word "line" in the act. A physical line is meant, not a business arrangement; and one piece of road may be part of several lines, as the road from Boston to White River Junction is part of the line to St. Albans and also part of the lines severally to Montreal, Ogdensburg, Detroit, Port Huron and Chicago. When a greater charge is made from Boston to White River Junction than is made by way of that point to any one of the other points named, the two are made for hauls on the same line, the shorter being included within the longer distance.

In the more recent case of the Railroad Commissioners of Georgia vs. the Clyde Steamship Co., and a number of railroads, the United States Railroad Commissioners had occasion to review this question as to their construction of the fourth section of the inter-state commerce act,

and to re-affirm their former rulings. In that opinion Judge Veazey says:

> If our long and short haul provision did not exist and the case were brought under the undue preference provision, the through and local traffic defense might possibly have some weight; but in the face of the mandate contained in the fourth section the claim of justification on the ground that one traffic is local and the other through is absurd. To allow such a claim would be to defeat the object of the section. The rate on through traffic to the longer distanced point may be proportionately less than the rate on local traffic to the intermediate point, but under the fourth section it cannot be less in the aggregate.

The commissioners have always held to this rule.

Columbus & Western Ry. Co., 11 S. C. Rep., 626.
Liphum & Co. vs. Illinois Central R. R. Co., 21 S. C., 584.
Atlanta & West Point R. R. Co. et al., 31 S. C., 19-85.

In the report of the Inter-State Commerce Commissioners, 41 S. C. Rep., 77, we have an express condemnation of the wrong committed in the case at bar, though not made with reference to it. The commissioners say:

> Iowa pays as much within five cents per bushel on corn as Nebraska, and the difference or advantage in freight is partly lost in the cost of production. To put the higher charge on the shorter distance state is to compel a change of burdens which, if the law should authorize, justice would forbid. The margin of profit on food products is too small to justify the imposition on any part of them other than its own necessary burdens, and before the higher charge can be imposed for the shorter distance state it will be necessary to repeal the fourth section of the interstate commerce law and the common law as well.

But we have a decision of the Interstate Commerce Commission upon the very question and the very tariffs complained of in this case. So far as the Osborne decision of the Circuit Court of Appeals professes to be based upon

rulings of the Interstate Commerce Commission, it is clearly an error.

On the 8th day of May, 1888, the railroad commissioners for the State of Iowa filed a complaint with the Interstate Commerce Commission, setting forth these very tariff sheets isued by defendant of date December 30, 1887, and of February 17, 1888, alleging a violation by defendant of sections three and four of the Act of Congress.

See page 157 of second annual report of I. S. C. Com.

The petition of the complainant before the commissioners contained the following:

That the 11-cent rate on corn and oats destined to Eastern ports, which took effect December 30, 1887, from Nebraska points to Rochelle or Turner, Illinois, over defendant's main line and connecting lines *controlled by it* (the through rate being from Rochelle or Turner to New York, 27½; to Boston, 32½; to Philadelphia, 25½; to Baltimore, 24½;) was never published at, nor could any shipments at such rates be made from Western Iowa points on defendant's road or branches. No billing or re-billing was done at Rochelle or Turner. The carriage was through from Nebraska to Chicago, where the transfer was made. While such 11-cent rate was in force from Nebrska points, E. M. Parsons, secretary and member of said association, had, at Carroll and Maple River Junction, Iowa, large quantities of corn, 1,374,505 pounds, to be shipped, and which he offered to defendant for shipment to New York by way of Rochelle or Turner, which was refused. He shipped to Chicago at the 19-cent rate, and could only ship to New York at a rate 8 cents above the rate from Nebraska points.

From February 17 to March 1, 1888, defendant had in force a joint through tariff from Nebraska points over its main line and connections to New York at 36½ cents per hundred pounds of corn and oats, in carloalds, and during that time carried from Carroll, Iowa, on main line, at least one shipment at that rate without billing. During said period from February 18 to March 1, 1888, Gray, Babcock & Sears, grain dealers, offered to defendant for shipment from Odebolt, Arthur and Ida Grove to New York, large quantities of corn at the same rate given the defendant to shippers from Nebraska points and at Carroll, but which the defendant refused to transport at other than the local rates to Chicago added to the rate thence to New York.

The commissioners upon this complaint decided that, "The state of the law as it was at the filing of the complaint, gave the commission no authority to make any award for the losses sustained by the unlawful acts of the defendant, but made an order among other mandates, as follows:

"This case being at issue upon complaint and answer on file, and having been duly assigned for hearing on the 26th day of July, 1888, and a hearing having been had upon the pleadings, proofs and arguments of counsel, and the report and opinion of the commission having been made and filed, whereby, among other things, it is found and decided that the defendant, by making higher rates on the transportation of grain from points on its north branches in Western Iowa to Chicago than were in force for approximately the same distance from points on its main line and south branches to Chicago, and by refusing to receive and transport corn from Western Iowa points to Chicago in like manner as it received and transported corn from Nebraska points to Chicago, unjustly discrim-

inated against the complainants and subjected them to undue and unreasonable prejudice and disadvantage in violation of the provisions of the act to regulate commerce."

This order was based upon the opinion of the commissioners and report as follows:

The putting in force in December, 1887, from Nebraska points over its main line from Turner and Rochelle, Illinois, a tariff of rates the same from time to time as the rates over competing roads from the same Nebraska points to Peoria, is admitted in the answer of said defendant company and claimed as a part of an arrangement for through traffic in corn from Nebraska to seaboard points. The rates to Turner and Rochelle were shown to be 11 cents per hundred pounds. It is also admitted that this rate did not apply at Ida Grove or other Iowa stations not on main line of defendant's road. Evidence was offered tending to show that it did apply at stations on the main line, which was neither denied nor admitted in the answer. The proof is conclusive that it was not in force or available to shippers from Iowa points either on the main line or branches. The same is true of the 36½ cent rate through from Nebraska points to New York, put in force in February, 1888, under which a single shipment was made from Carroll Station, Iowa. Neither does it appear that any shipments were made from Iowa under the tariff taking effect March 5, 1888, between Iowa points and Turner, Illinois, for corn and oats destined to seaboard points. Nor were tariff sheets of such rates, or rates from Nebraska points posted at Iowa stations, nor was the public otherwise notified that such rates were in force or shipments possible at such rates from Iowa points, either to Rochelle or Turner, Illinois, or to the seaboard. All the details of this traffic do not fully appear. The traiff sheet taking effect March 5, 1888, directs that grain destined to seaboard points be way-billed to Turner, Illinois, but at different rates, as it might or may be destined respectively to various eastern points. The method of conducting this traffic from Nebraska was substantially as here indicated. The freight went through without change of cars or rebilling at Turner to Chicago, where the transfer was made and rebilling was done. Shipping and way-billing to Turner, as directed, was a shipment to Turner, and such a shipment is in no legal sense a through shipment to the point of ultimate destination at the seaboard. Freight taken and billed from the same place in Nebraska or Iowa to Turner, Illinois, at lower rates if destined to one place than to another, is giving an illegal preference. It is claimed by the defendant that these shipments

were intended to be through from the place of shipment to the seaboard, and that the charge to Turner indicated the defendant's share of the through rate. The complainants insist that the course of business attending the traffic, has the appearance of a device to cut legitimate agreed rates, by which the carrier east might give the defendant's line more than its fair division for the carriage west of Chicago. But through carriage to the seaboard, grain growers in Iowa had, and have, a right to share in it on equal terms with those in Nebraska, having due regard to the circumstances, if any, which might vary the reasonableness of the rate from different points of shipment. This was denied to the complainants, and they were unlawfully subjected to unreasonable disadvantage in marketing their corn.

THE VIOLATION OF THE THIRD SECTION.

The third section of the Act of Congress makes it unlawful to make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever, or subject any particular person or locality to any undue or unreasonable disadvantage in any respect whatsoever.

The fourth count of the amended petition is more especially framed under this third section of the Act, but we claim that the acts set forth in the other counts of the petition are also clearly within the prohibition of this third section.

We claim that the opinion of the Circuit Court of Appeals utterly fails to meet the case set forth in any of the several counts of our petition, in regard to the violation of the third section.

It is said in the opinion by Judge Thayer, that it was found in the Osborne case that the tariff sheet of December 30, 1887, was a through rate from Nebraska points to the seaboard and that the caption of the tariff sheet of December 30, 1887, set out in the petition, justifies the conclusion that it was a joint tariff from Nebraska points

to the seaboard. The caption of the tariff sheet is as follows: "Joint tariff on corn and oats in car loads when destined to New York, Boston," etc., etc., and a foot note is upon the sheet as follows: "Prepaid way bill through to Rochelle, Ill., via Missouri Vallley, at rates given above. For rates from Rochelle to Baltimore," etc. See C. & N. W. G. F. D. No. 2604, Nov. 25, 1887. Amendments and subsequent issues.

H. R. McCULLOUGH,
G. F. A., C. & N. W. R.
K. C. MOREHOUSE,
G. F. A., S. C. & P. F. E. & M. V. R's.

The averments of these first four counts of the substituted petitions were as follows:

Plaintiff avers that the fixing of said points of Turner and Rochelle as the pretended terminus of the shipment of corn and oats under said special tariff of December 30, 1887, was a mere device to evade the law. That Turner and Rochelle were not grain markets and had no elevators or facilities for handling grain, and said grain was intended to be, and was, in fact, transported by defendant to Chicago, Ill., and was then sold on the market or delivered to connecting roads for eastern seaboard points.

This averment is admitted by the demurrer and just how the caption or foot note to the way bill could control the fact as averred of what was intended and what was actually done by defendant, is not very clear to us. It was perfectly competent for the defendants by answer, to set up that this freight bill of December 30, 1887, was part of a general arrangement for through shipment from points in Nebraska to the seaboard, just as was the freight tariff of February 17, both in form and substance. If so, then the question would arise on all of the counts, whether or not a through rate from Nebraska points to the sea-

board that was refused to Iowa shippers on and over the same line for the shorter distance, was not a violation of both the third and fourth sections of the law. This interpretation of the way bill of December 30, 1887, places the whole case upon the same footing as the case made in the substitution for the fourth count of the petition for refusing *"through shipments under the tariff of February 17, 1888."*

The allegations of the substitute for the fourth count as to refusal of defendant to give the Iowa shippers the benefit of this through rate are as follows:

Plaintiff avers that the defendant, The Chicago & Northwestern Railroad Company, combining together with certain other railroad companies operating roads east of Chicago to the city of New York and other seaboard points in connection with the said K. C. Morehouse, as named in the former counts of this petition, to give preference to shippers of grain on the line of the Fremont, Elkhorn & Missouri Valley railroad in the state of Nebraska, and unlawfully to discriminate against plaintiff and other shippers of grain in the state of Iowa, did issue and put in force on the 17th day of February, 1888, at all the stations on the said Fremont, Elkhorn & Missouri Valley railroad in Nebraska between Blair and Skull Creek and each of said points, a certain tariff on corn and oats destined for New York and other seaboard points, whereby it proposed to transport, and did on and between said 17th day of February and the first day of March, A. D. 1888, transport corn and oats from Blair and other points in Nebraska on the line of said road, to New York for 36½ cents per 100 pounds, and to Boston for —— cents per 100 pounds, and to Philadelphia for 34½ cents per 100 pounds and to Baltimore for 33½ cents per 100 pounds.

Plaintiff avers that all of said points on the Fremont, Elkhorn & Missouri Valley road were a greater distance from Chicago and from New York and other seaboard points aforesaid, than the stations on the defendant's road in the state of Iowa.

That the said tariff only provided for and named points in Nebraska, and said tariff was not furnished to or made known to the agents of defendant at Iowa points, and was not filed with the Interstate Commerce Commission, and was not printed or published as required by said commission or by law, and the rate therein named was denied to shippers in Iowa points on defendant's road. That the only rate on corn

and oats made known during February, 1888, to shippers at Iowa points on defendant's road was a local rate to Chicago and a rate of 27½ from Chicago to New York, and a corresponding high rate from Chicago to other seaboard points.

That said local rate from Carroll to Chicago was 19 cents per 100 pounds.

Plaintiff further shows and avers that at and during the time of the shipment of corn and oats from Nebraska as aforesaid to New York and other seaboard points, as aforesaid, there has accumulated at the stations on defendant's road in Iowa large quantities of corn and oats for shipment east, but that defendant failed, refused and neglected to ship the same, and delayed the shipment thereof, upon an alleged reason that they had not sufficient cars to ship the same.

Plaintiff avers that between the 17th day of February and the 1st day of March, A. D. 1888, and at the several dates named in Schedule No. 4, attached to original petition and made a part of this petition, plaintiff has for shipment at Carroll, Iowa, aforesaid, the number of pounds of corn and oats in the said schedule described, and plaintiff was prevented and deprived, by reason of the matters herein alleged, of the right to ship the same upon the terms and at the rates given to shippers in the state of Nebraska, and plaintiff then and there was compelled to ship and did ship said corn and oats on and over the road of defendant from said station of Carroll to Chicago, Ill., and defendant then and there demanded, and received for said service the sum of 19 cents per hundred pounds for the transportation of said corn and oats to Chicago, and subjected said plaintiff to a further charge of 27½ cents per 100 pounds to transport the same to New York and a like local charge to other seaboard points, or dispose of the same at Chicago at 27½ less per hundred than the price at New York.

Plaintiff avers that the charges so made, demanded and received and collected as aforesaid, were unlawful, unreasonable and unjust, and contrary to the provisions of an act of Congress entitled "An act to regulate commerce," approved February 4th, 1887, in that an unlawful preference and discrimination was practiced by defendant in favor of shippers of grain in the state of Nebraska, and against this plaintiff, a shipper of grain in the state of Iowa, and in that defendant charged and demanded a greater compensation for a short than for a longer haul in the same direction over the same line, the shorter being included in the longer haul and being for a like and contemporaneous service in the transportation of a like traffic under substantially similar circumstances.

The opinion of the Circuit Court of Appeals was writ-

ten before this court decided the case of the Texas Pacific Railroad, 162 U. S., 184. The opinion written by Judge Thayer says: "The purpose of the allegations touching the non-publication and non-filing of the rate sheet, seems to have been to show that there was an actual intent on the part of the defendant company to discriminate against Iowa shippers, but it matters not what its intent may have been, if the act committed was not an illegal discrimination, though intended as such." The opinion then proceeds to determine that under the general order of the Interstate Commerce Commission, no publication of the through tariff was necessary at Iowa points. The opinion seems to be entirely oblivious of the fact, that the court in the Osborne case decided that the several roads entering into and agreeing upon a through tariff from Nebraska points to the seaboard thereby contsituting *a new line of road*, within the meaning of the Act of Congress. If this was correct then the new line of road was subject to the same duties and liabilities as though owned and controlled throughout its entire length by a single company.

Section 6 of the act of Congress provides that, "That every common carrier subject to the provisions of this act shall print and keep for public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its railroad, as defined by the first section of this act. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad, between which property and passengers will be carried, and shall contain the classification of freight upon such railroad, and shall also state separately the terminal chrges and any rules or regulations which in any wise change, affect or determine any part of the aggregate of such aforesaid rates and fares and charges. Such schedules shall be plainly printed in large type, of at least the size of ordinary pica, and copies for the use of the public shall be kept in every depot or station upon such railroad in such places and in such form that they can be conveniently inspected.

This requirement of section six of the Act could not be suspended or superseded by any order of the commissioners. The authority given to the commissioners in the subsequent part of this section relates to publicity in addition to that required by the Act. The Circuit Court in this connection also mistakes the purpose of the provision of this section, requiring these joint rates to be filed with the commissioners. How was it possible for the commissioners to make an order in regard to the publication of a joint tariff until they had official knowledge of its existence?

The Circuit Court of Appeals very much to our surprise in determining this case, on demurrer, took judicial notice of an order of the commissioners that was plead in the Osborne case. We had supposed that the defendant when they answered our petition would be required to plead the order of the commissioners, and prove it on the trial, and also prove that the joint rate sheet was filed with the commissioners, for unless it was so filed the commissioners could not judge of the necessity of an order of publication. We anticipated this by our petition and averred that the rate sheets were never filed. This was admitted by the demurrer, and yet the court holds in effect that an order of publication may be avoided simply by avoiding filing or apprising the commission of its existence. The fact that the petition attempted to express was, that this entire performance of giving special rates to Nebraska shippers was a secret and surreptitious affair consciously unlawful by the men who committed the act.

These peculiar tariff sheets, the originals of which we beg leave to submit to the court, upon their face bear evidence that they were never intended for publicity and were never intended for through tariff rates from some

exceptionally important point to the seaboard. On the contrary, they are in terms distance tariffs evidently intended to be temporary in their duration and issued for some special purpose and not in the ordinary course of legitimate business in the interests either of the stockholders of the railroad or in fairness to the general public.

But the substitute for the fourth count of the petition does not stop with the allegation that the defendant Company did not publish this through rate at its stations in Iowa, nor that the Company failed to file the rate sheets, but in addition thereto avers expressly that *the rate therein named was denied to shippers at Iowa points on defendant's road, and further that plaintiff by reason thereof was prevented and deprived of the right to ship his corn upon the same and at the rates given to shippers in the state of Nebraska and was then and there compelled* to pay the two local rates of 19 cents and 27½ cents to New York.

The theory and only theory upon which the case was decided is contained in the following part of the opinion of Judge Thayer:

"Of this contention it may be said that while the present petition does charge an unlawful discrimination against persons and places, yet the only material fact averred to support the accusation is the fact that the defendant charged a local rate of nineteen cents per hundred for hauling grain from Carroll to Chicago, while eleven cents per hundred being its proportion of a joint through rate to the seaboard, was the sum received by it for hauling grain a longer distance from Blair and Kennard to Rochelle, which latter point was a station on its road intermediate between Carroll and Chicago. It is manifest that the alleged disparity between the local rate and the defendant's proportion of the joint through rate

is not sufficient, as a matter of pleading, to establish the charge of 'undue or unreasonable preference or disadvantage' under the third section of the Act unless it follows, as a matter of law, that because of the alleged disparity in the two rates an undue or unreasonable preference was given to persons and places."

The court then proceeds to discuss the proposition that a proportional charge of the through rate is not a violation of the law. So far as this opinion of Judge Thayer discusses the question or cites authority upon the proposition, that "the alleged disparity between the local rate and the defendant's proportion of the joint rate" is not sufficient to establish the charge of undue preference under the third section of the Act, it is simply an utter misapprehension of the pleading and a decision of a question that was not in the case. There is nowhere in the petition any such statement or claim, or anything from which such a claim could be reasonably inferred. The substitute for the fourth count has no reference whatever to the eleven cent rate under the tariff of December, 1887. It sets forth a 36½ cent through rate from Blair to New York, and bases plainiff's claim on the refusal of defendant to give such a rate to plaintiff, and subjecting plaintiff to a charge of two locals that aggregated 46½ cents to New York, and refusing to ship for Iowa shippers upon the through tariff.

And as to the other counts, the court in the first part of its opinion had decided that the eleven-cent rate was part of a through rate from Nebraska to New York, and it was the refusal of this through rate to Iowa shippers that is the substance of plaintiff's complaint in those counts.

It is no answer to our claim not to understand it. If we

have heretofore been so unfortunate as not to be able clearly to present it, we hope that we may be excused for trying now to make it clear to this court. The confusion appears to rise from the fact that the Circuit Court of Appeals had its attnetion too constantly fixed upon the initial point of the shipment, and consequently omitted the consider the question whether a through rate did not also apply to shipments begun or ended, at points nearer than at the termini that the railroad chose to fix as the termini of the through traffic rate. And if the point of shipment or point of delivery was anywhere between the termini or what the railroads chose to fix as the beginning and end of a through rate haul, then the shipment was necessarily in the opinion of that court local traffic, and any rate whatever might be levied without reference to the through traffic. This was the theory upon which the railroads resisted the order of the Interstate Commerce Commission in the Social Circle case, 162 U. S., 164, Supra. But this court held that if by "joint arrangement," a through rate was fixed from Cincinnati to Augusta, the Georgia road could not claim to charge a local rate from Atlanta to Social Circle, and add such local rate to a joint rate from Cincinnati to Atlanta, and that the aggregate charge from Cincinnati to Social Circle, could not by such a device be made more than the through rate from Cincinnati to Augusta, the latter being the longer distance over the same line. And no reason can possibly exist why the same rule should not be applied, where the railroad company refuses to recognize a different starting point on the line, nearer the end of the route. It is precisely the same as where they refuse to recognize a nearer point of delivery. Here the through rate was sought to be applied by the

company exclusively to grain shipped from Nebraska to New York. Iowa was nearer to New York than Nebraska, just as Social Circle was nearer to Cincinnati than Augusta. Suppose in the case decided by this court in 162 U. S., Supra., the shipment of carriages had been made at some point on the line, fifty miles nearer Augusta than Cincinnati, could the railroad company have ignored the through rate and charged more than the rate from Cincinnati to Augusta and said we will compel the shipper to ship on two or more local rates? And that is precisely the case we have here. The corn shipped at Carroll was 108 miles nearer New York than that shipped from Blair, Nebraska, was over the same line, in the same direction and included in the longer line, yet the rate was ten cents a hundred more. To say that this was affording equal facilities for Iowa shippers and was not a discrimination against Iowa shippers, is contrary to reason and justice.

There is another peculiarity of the case worthy of consideration. The long haul charge is ordinarily made cheaper in proportion to shorter hauls for the reason that at distant points in the country we have great commercial centers, where there is a vast accumulation of business, and an active competition by competing lines in order to secure the business. It is a peculiar fact in this case that here no such circumstances existed. On the contrary there was a through rate from each point or station on the line of road in Nebraska, increasing the rate to Turner from eleven to twelve cents, then to thirteen, fourteen, fifteen and sixteen cents per hundred, as the distance increased, or diminishing the rate as the distance shortened. The same was true of the through rate to New York on the tariff of February 17, 1888. These stations were mere

way stations on the road, and the grain shipped was the product of the locality. The petition also shows that the motive was not to secure business, for it is expressly averred in the petition and admitted by the demurrer, that "during the months of December, January and February there had accumulated on the line of the defendant road in Iowa, large quantities of corn and oats for shipment that the defendant failed, refused and neglected to furnish cars to ship, for the alleged reason that is was unable to supply sufficient cars therefor.

Why then this discrimination and offer of extraordinary inducements to shippers in Nebraska. The petition alleges that the corn in Nebraska was owned largely by a brother of the freight agent who issued this rate. The Circuit Court of Appeals says this was immaterial, because it is not expressly averred that this relationship was the motive for the discrimination. It is not necessary to aver any corrupt motive. The act under the law is prima facia illegal and it was for the defendant to justify the act. This court, will no doubt, take judicial notice of the fact that Iowa is largely responsible for the passage of the inter-state commerce act. Her Senators and Representatives in Congress were active and prominent in securing the passage of the Act for the protection of her agricultural products. Without such protection or with such an adverse interpretation of the Act as the Circuit Court of Appeals has given to the Act, the value of Iowa's productions is at the mercy of the railroads upon which the people of the state are wholly dependent to get their produce to market. The records of this court disclose the fact that the great struggle beween the agricultural interests of the country for a reasonable governmental control of the railroads originated with and has

been maintained largely by the people of that state. The attempt to make her shipments local traffic, to be taxed at local rates, and refuse her access to the seaboard and the markets of the world, upon the same terms as those afforded to other and more distant states, may have had its origin in a desire to discipline her citizens for attempting to secure justice by legal enactments. This wrong of the railroads cannot commend itself to the judicial power of the nation. In this tribunal all peoples as well as individuals are equal before the law.

We repeat here and wish to emphasize the fact that this case presents no question as to the legality of charging a grater local rate than a proportion of a through rate. That question is not in the case. The petition nowhere claims such a thing and there is not a single allegation in the petition from which such a claim can reasonably be inferred. The conclusion of the Circuit Court of Appeals is based upon an utter misapprehension of the pleading. If the eleven-cent Nebraska rate was part of a through rate to the seaboard, our complaint was that we were refused the through rate. The fact that plaintiff's corn as set forth in the first four counts of the substituted petition was shipped to Chicago was plead as one of the results and consequences of the wrongful act of the defendant in refusing the through rate, and the fifth count of the substituted petition does not base the claim for damages upon the eleven-cent rate or upon any rate to Chicago but bases it exclusively upon the refusal of the through rate to New York. The Circuit Court of Appeals appears to have been impressed with the idea, that the defendant Railroad entertained, and that was whilst Nebraska shippers desired to send their corn to the seaboard, yet Iowa shippers necessarily sent their corn to Chicago.

The petition very plainly tried to advise the court to the contrary, by the following direct allegation in the first count thereof:

> The plaintiff avers that during the month of February, 1888, he had on hands at Carroll, in the state of Iowa, large quantities of corn and oats for shipment to such points east, beyond the state of Iowa, as the markets and the ratesof freight charges might determine would be most profitable to him as a dealer and shipper of grain.

And the substitutes for the fourth count of the petition makes no reference whatever to the eleven-cent Nebraska rate, but is based exclusively on the refusal of defendant to give plaintiff the through rate to New York of 36½ cents and compelling plaintiff as a consequence to ship his corn to New York on two local rates of 19 cents and 27½ cents, making a difference of 10 cents per hundred on 107,750 pounds of corn.

What we ask of this court is, that the question we here make and present to the court by plain and unequivocal averments, shall not be disposed of by the decision of some proposition that is not in the case, but that the court will decide whether these averments and the state of facts here set out, and admitted by the demurrer, constitute a cause of action against defendant either under the third or fourth sections of the Act of Congress.

A decision of these questions according to what we believe to be the intent and purpose of Congress and in accord with what we conceive to be the plain letter of the statute will restore to the great food-producing regions of the country the relief and protection so necessary to their prosperity and the prosperity of the nation as well.

C. C. NOURSE,
Counsel for Plaintiff.

APPENDIX.

After the fourth section had been amended by the conference committee, the first senator that spoke in opposition to it was Senator Morgan, of Alabama. He said (Con. Rec., p. 396, January 6, 1887):

I am not content with the bill in respect of its practical effects upon the people of my own state; for Alabama is at the further southern margin of the United States; and the markets in which we buy our dry goods, and a large portion of our groceries, are in the far northeast, and there is a broad intervening area of country between them. The markets in which we buy our supplies are also far distant from Alabama; they are in Chicago, St. Louis and Cincinnati chiefly. The markets in which we sell our products are all distant from our homes, and we have a vast tract of country to cross in getting over to the market of purchase, or the market of sale; so I think that any bill that forces the railroads of this country to raise the price of charges of freights for long hauls is necessarily inimical to all the different business occupations in my state. That pratical statement of the reasons why I oppose this bill is quite sufficient, but I have other reasons.

Next we have a memorial of the chamber of commerce of New York City, presented to the senate January 10, 1887, page 477, approving of the bill except sections four and five. The objection to section four is stated as follows:

The prohibition to charge more for the shorter haul than a longer one is objectionable, and certain to work against the public welfare. If enacted it would do little good to any one. Local rates would not be thereby reduced, but through traffic, which on the average furnishes not to exceed one-quarter of the revenues of the trunk lines, would be either refused or raised to a standard of local rates, thus obstructing and materially decreasing the moving and exportation of cotton, grain, petroleum and other products. Upon the utmost freedom in making through contracts from the west to the seaboard depends the development of the entire west and its farming lands.

We call the attention of the court here to the fact that the speech of Senator Morgan and the memorial of the chamber of commerce of the city of New York is all nonsense if the fourth section of the act means that the local rates of these roads are not to be affected by the through rates, and that the local rate might exceed the through rate fixed for a combination of roads. Senator Morgan certainly was not so ignorant of the carrying facilities of this country as to suppose that Alabama was connected with Chicago, St. Louis and Cincinnati by a single road belonging to and operated by a single company. He knew, as this court judicially knows, that Alabama reaches these markets by through rates made over a combination of roads that would have formed a "third line," if the court's construction of the fourth section is correct. If he had believed in this court's construction of the fourth section, he would have known that the through rate would not at all affect the local rates, and not being thus affected the through rate would not be increased by reason of this provision of the act. And why should an intelligent body like the New York chamber of commerce declare that this fourth section would compel the trunk lines to refuse through traffic or to raise the through tariff to a standard of local rates? And why did not some senator, pending the discussion, explain that no such result could follow, because the through rates being a joint rate could not affect the local rates at all? No such explanation was given. Senator Wilson, of Iowa, in favor of the bill, says (p. 310 of the Cong. Rec., December 21, 1886):

> The two sections, four and five, quoted, have been sharply criticized by the representatives of the railroad companies; by letters in the public press, and by telegrams, from the first day they were first given to the country in the report of the conference committee. It is objected that the provision of the fourth section in respect to distances will, if

enacted into law, establish a rule of milage rate that it can only be obeyed by the companies by charging the same rate per mile, no matter what the distance may be. I shall not stop to discuss the subject presented by this objection. It is sufficient to say that the section presents no such proposition, and I shall discuss what we have before us instead of wasting time on what is not here. The language of the section is "That it shall be unlawful for any common carrier subject to the provisions of this act to charge and receive for the transportation of passengers, or of like kind of property under substantially similar circumstances and conditions, for a shorter than for a longer distance, over the same line in the same direction, the shorter being included in the longer distance." What does this mean? Let me answer this question by an illustration. In round numbers it is—say—500 miles from Omaha, Nebraska, and Council Bluffs, Iowa, to Chicago, Illinois. Suppose the railroad companies operating lines between these points should, in the event of this bill becoming a law, fix a rate on any particular class of freight at $40 per car for the entire 500 mile haul, what would result as to intermediate points? Why, that each of such points could not be charged more than $40 per car for a shorter haul or a like class of freight over the same line. The charge for the haul over the entire line would be the maximum rate for carriage over a part of the line. If the charge be $40 per car from Council Bluffs over the Chicago, Burlington & Quincy line, then no more than that can be charged from Red Oak, Chariton, Ottumwa, Fairfield, or any other station on the line in Iowa to Chicago, or from any of them to any station on the same road in the state of Illinois. The establishment of this rule by law will be a great relief to all of the people and business on all of said lines, and like results will come to people and business of every other state, and the territories as well, on every railroad in the country within the terms of the act. The experience of intermediate stations under this rule would be very different from that which the practice of the railroad companies now inflicts them with. Now it is not uncommon for intermediate stations to be forced to pay for the transportation of freight, both to and from them, double the rates charged between the terminal points of the roads on which they are situated, and this great wrong is one of the most forceful causes of the complaints which have come up from the people relative to railroad management; while it exists there will be discontent, and there ought to be, for the practice is in every sense wrong. It proceeds upon the theory that it is the privilege of railroad companies to unload upon the hitherto helpless intermediate stations all the losses and burdens which have resulted from the bad management of the administrators of the affairs of the corporation.

It will be observed that in these illustrations the senator from Iowa speaks of transportation from Omaha to Chicago as on a par with transportation from Council Bluffs to Chicago, though the former is over the Union Pacific to Council Bluffs, just as in the case at bar the transportation from Blair, Nebraska, is over the Elkhorn & Sioux City to Missouri Valley and thence to Chicago over the Northwestern.

And on page 488 of the Congressional Record we have quoted and approved by him the views of the other senator from Iowa, Senator Allison, who favored the passage of the bill. It is as follows:

> When the Boston and Albany, New York Central and Lake Shore combine and fix a through rate from Boston to Chicago, they cannot charge more between Boston and Buffalo than the aggregate charge.

And Senator Cullom, quoting this, approves it and says:

> My answer is that, if the combination of carriers named by the senator agrees upon and publishes a schedule of joint rates between Boston and Chicago, the charge made to Buffalo must not exceed the sum charged to Chicago; but it may be the same so far as this short haul section is concerned. The prohibition made by this section is simply against charging more in the aggregate to Buffalo than to any point beyond Buffalo on the line composed of the three lines named. The charge to Buffalo must not exceed the amount charged to Chicago; but that is not all; it must not exceed the charge to any point between Buffalo and Chicago to which the combination composed of these three carriers makes joint rates.
>
> If the charge to any of the intermediate points is less than the charge to Chicago, such smaller sum becomes the maximum amount that can be charged to Buffalo, instead of the charge to Chicago.

Then, in reply to another question asked, why six lines combined from Boston to San Francisco would not authorize a charge from Boston to Buffalo equal to the

charge from Boston to San Francisco, Senator Cullom replies:

> There is nothing in the short haul section, standing by itself, that would prevent the same charge being made from Boston to Buffalo that is made from Boston to San Francisco, if we can assume that no smaller charge is made to any point between Buffalo and San Francisco. When six carriers combine to make joint rates between Boston and San Francisco, they become a different line, and not the line that we are talking about from Boston to Chicago. The charge this different combination could make to Buffalo would be limited, first, by its charge to San Francisco, then by its charge to Ogden, if that was less; then by its charge to Omaha, if that was less; then by its charge to Chicago, if that was less, and finally by the lowest charge made to any point west of Buffalo to which this combination of six carriers made and published joint rates.

Now what does Senator Cullom mean when he speaks of this same combination of carriers carrying to intermediate points? Evidently he means one or more roads composing or that are a part of such combination. What has the Lake Shore road to do with the carriage from Boston to Buffalo, and how else could the joint rates established by the three roads from Boston to Chicago control the joint rates from Boston to Buffalo except by the construction and operation of the fourth section as we contend it should be construed and applied? Certainly the three roads united can make rates independently of the local charges of any two of the three if they can make them independent of any one of the three.

If three roads united can make rates independently of the local rates of any of the three, then why cannot two of the combination also make a new line? But the case of the six roads uniting from Boston to San Francisco makes a still stronger case. Here it is conceded by Senator Cullom that the rates from Boston to Buffalo over only two short roads must be controlled by the maximum rate to any point west of Buffalo and between that and

San Francisco. Why should the local rate from Boston to Buffalo be required to be not more than from Boston to any point west of Buffalo when four other roads enter into the combination that carry the freight from Boston to San Francisco? We think it clear that the senator meant that any one or more roads entering into the combination were a part of the same line, and were bound to conform their short hauls not to a *pro rata*, but to a sum not greater than any aggregate for a longer haul, to which aggregate charge they were a party. With this idea in view, the language used by Senator Cullom is easily understood and reconciled with the general tenor of the discussion.

At this point in the discussion, Senator Harris, a member of the conference committee, assumes the burden of defending and defining the meaning and operation of the fourth section. Senator Harris says:

> Now to answer the question and to illustrate, assume that by contract upon the long line from New York to San Francisco composed of four independent distinct lines, becoming one, by contract and agreement, that line agrees to haul a car load of grain from San Francisco to New York for $100. By agreement each of these four companies agrees to accept $25 each, making the hundred. If this agreement extends only for through freights from San Francisco to New York, the hundred dollars would be the maximum long haul charge, and it would be the maximum of any short haul that passes over *two or more* of these roads. But suppose, by contract, the parties agree to carry from San Francisco to New York at $100 a car, from Ogden to New York at $75 a car, from Omaha to New York at $50 a car, then the rule would be, from Ogden to New York, that is from any point east of Ogden to New York, they could not charge more than $75, and from any point east of Omaha to New York they could not charge more than $50.

Senator Aldrich put this question to Senator Harris:

> Between New York and San Francisco ten different railroad companies have joined in a contract, which constitutes a distinct, separate

line from San Francisco to New York. Now is it a new line when nine of those join in that contract, and are they exempted from the provisions and limitations which apply to the line of ten companies? and if eight, if seven, if six, can each one of these companies make a new contract with new rates which have no limitations to the nine or ten? That is what the senator from Illinois said, that then you can fix your rates entirely separate and apart from the line. If these are separate and distinct lines, nine can charge more than ten; eight can charge more than ten; seven can charge more than ten; until you get down to two, and they can charge more than ten, and then you only have one line.

Mr. Harris replies as follows:

The case I put originally it seems to me clearly and distinctly answers the senator's question. If this long line, being constituted with four separate, distinct and independent lines, has contracted for through freight and through freight only, I do not see that their contracts or the existence of that line would affect any other than the through shipments, but if, in their contract constituting that long line composed of the four distinct lines, they fix one rate from San Francisco to New York, another from Ogden to New York, or any of the intermediate points including more than one of the lines to carry the freight, then the short haul provision would apply to the maximum charge fixed by that line upon which the freights were to be transported.

The above is perhaps the strongest language used in the discussion that would admit of the construction that the through combined rate would not be a limitation upon the local charges of any one road in the combination.

Yet when you examine the language in view of the point intended to be illustrated, it will bear no such construction. Certainly Senator Harris knew that in a tariff for through rates established by four roads extending from New York to San Francisco, the same tariff sheet would not in terms fix the local rate from New York to Buffalo, nor from New York to Chicago. What in the name of common sense would the roads west of Chicago have to do in making a schedule that should in terms fix

the rates over the New York Central and Lake Shore only? What the senator evidently meant was, that the New York Central and Lake Shore *could not become a party* to establishing a through rate to Omaha, and at the same time charge a greater sum for a shorter haul over a part of *the same line.*

What does the senator mean when he uses the phrase: "Or any of the intermediate points including more than one of the lines?" Does the court suppose that he meant that a through arrangement in which four roads united would control the freight on two or more of the roads, but not on any single one of the roads? There is no reason in that, and nothing in the language of the section would justify such a construction.

What was clearly meant was that this through rate would not affect the rates to be charged upon any part of the through line, in the sense that the proportionate charge of the through rate was not a maximum that would control the charges upon any one road entering into the combination; but at the same time each and every road entering into the joint agreement thereby created an aggregate charge for the long haul that could not be exceeded by any one or more of the roads for a shorter haul on its own road or any two or more of the roads.

Mr. Harris, immediately after this colloquy, on the same page 490 of the Record, says:

> But the shipper from a point non-competitive, where he must accept the terms of the carrier or allow his produce to perish upon his hands, is the shipper whom I want a short haul law to protect. That is the very object with me in having insisted from the moment I entered the interstate commerce committee, and I continue up to this moment, and shall continue to insist upon a short haul provision, so as to give the shipper from the non-competitive point some protection against unrea-

sonable and unjust exactions; and for another reason, take Chicago for instance, as a competitive point, when the rate wars may rage and drive through freight down to an unreasonable point, if the competing carriers there know that however low they may put their rates from Chicago to New York, they cannot charge an aggregate sum greater for any short haul between Chicago and New York, it will do more to restrain and prevent rate wars than all your pooling contracts have done or ever will do.

Yet Mr. Harris knew that the freights from Chicago to New York were carried over lines composed of connecting roads. What force is there in his illustration if these connecting roads could charge their local rates for a part of the route greater than the aggregate for the long haul of the combination? The object of Senator Harris declares that he had in view is clearly defeated and utterly defeated by this court's construction of the fourth section of the act.

We next call the attention of the court to the discussion in the house of representatives upon the bill as it came from the conference committee, and here we have been unable to find a single expression that would justify the interpretation the court of appeals has given to this fourth section.

Mr. Crisp, who was a member of the conference committee on the part of the house on this interstate commerce bill, under date of January 18th, page 782, says:

Mr. Speaker: I confess I cannot see, as suggested, that the effect of this proposition will be to increase the through rates, unless the present through rate system is based upon a rule which requires the local shippers to sustain the loss incurred on the through rate. If the charge from New York to New Orleans of seventy-six cents pays a small profit to the railroad company, I ask again what kind of a profit must be paid for a haul which is half the distance when the charge is 33 1-3 per cent more. We do not seek, as I was going on to say, to establish any *pro rata* arrangement of so much a mile. We agree by this bill that the companies may charge, if it is reasonable to do so, as much for the short haul as for the long haul and no more.

Did not Mr. Crisp know that there was no such a thing as a through road from New York to New Orleans?

On page 783, Mr. Hopkins says:

I ask the gentleman (Mr. Crisp) if the clause in section four will not have a tendency to prohibit these wars? If they put down the price of freight at a terminal point, they may be compelled to put it down *all along the line*, and no road can afford to engage in such a war with section four in the bill.

To which Mr. Crisp replied in the affirmative. Mr. Crisp further on, on page 784 of the Record, says:

From the Cullom bill these words are stricken out: "And from the same original point of departure to the same point of arrival." Those words were stricken out because, in our judgment they put a limitation upon what we understood to be the rule that in no case should a greater amount be charged for a shorter than a longer haul. By striking out those words, we made the rule general that in no case could such a charge be made, *no matter what the point of departure or the point of arrival might be.*

On page 790 of the same record Mr. Hopkins said:

The construction which has been placed on section four by the conference committee of the senate avoids all of the difficulties raised by gentlemen who oppose the bill on account of its provision relating to the so-called long and short haul. That construction will secure to the farmers and shippers of Illinois and the west as favorable rates for through freights, otherwise known as the long haul, as they have now, while under the provisions of the bill, all shippers at intermediate points on the line of the road, *or roads forming the line* over which the long haul shipments are made, will be protected from unjust discriminations or extortions. The gentleman from Georgia (Mr. Crisp) who presented to the house this afternoon the reasons which actuated the conference committee in agreeing upon the bill in the form we are now considering it spoke of the disastrous results to the commerce of the country and shippers and the people generally from a war of rates between two or more of the great trunk line railways at competing points, such as Kansas City, Omaha or Chicago, for through freight to New York City or some other seaboard city. What the railroads lose by such wars at these terminal points, it is claimed, are imposed upon

the people and shippers at intermediate points on the line of the road between their eastern and western termini, so that the people are the ones upon whom finally the great burden falls. Now by this section of the bill provision is made that the charge for the shorter haul on such a line shall not be more than for the longer haul, except in special cases, and whatever the rates at the terminal points of such competing roads may be reduced to, *all the intermediate points* will get the benefit of such reduction. This fact will serve as a most effective check upon the hostilities of competing railroads and will secure fair and uniform rates.

Mr. Burrows, in the house, January 20th, page 864 of Congressional Records, said:

The long and short haul provided for in the fourth section is objected to as working a hardship upon through shippers. Let us examine this a moment. The bill does not undertake to fix through or local rates for any road. It is not a castiron arrangement. It leaves the railway managers perfectly free to fix their own through charges, governed only by the common law that they shall be reasonable. Fix your own through rates, it says to the railroad, but with this simple understanding, that these through rates shall be a *guide for and govern your shorter haul.* If there was but a single railroad line running from Chicago to New York, there would be no objection to this provision of the bill. In such cases, there being no competition, the shipper at Chicago would be charged a reasonable rate, say $25 for carrying a horse, we will say, from Chicago to New York, a reasonable and fair rate for that distance, and a shipper at South Bend, under this bill, in such case, would be charged not to exceed $25 for a like service. Why, Mr. Fink himself testified before the Cullom committee that this provision is substantially adopted by the railroads in practice. Here is what he says: "The local charge can always be properly regulated when proper through tariffs are maintained; hence the first object should be to secure the maintenance of properly adjusted through tariffs that are reasonable to the public and to the railroads. This done, there will be no difficulty in adjusting local tariffs and preventing unjust discriminations.

Mr. Burrows continued:

Now the shipper at South Bend says that if $15 for the carriage of a horse from Chicago to New York is a reasonable and fair rate, and it must be because you have adopted it, then the charge of $25 from South

Bend to New York for like service is an extravagant and extortionate charge. If $15 is a reasonably paying rate from Chicago to New York, then certainly $15 is a paying rate from South Bend to New York. This bill steps in and enforces the reasonable rate from South Bend to New York and gives the shipper the benefit of the rate from Chicago established by wholesome competition.

Mr. Burrows further says:

When the railroad companies come to understand that their short haul rates are governed by the rate fixed for the through traffic, they will carry competition at competing points only to the limit of reasonable and fair compensation.

He further says:

The bill will prevent the through freight being carried at a loss and loading the burden of the loss on the shippers along the line, and the shippers along the line ought not to be compelled to carry this burden.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1896.

No. 198.

E. M PARSONS, Plaintiff in Error,

vs.

CHICAGO & NORTH-WESTERN RAILWAY COMPANY,
Defendant in Error.

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR DEFENDANT IN ERROR.

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In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR DEFENDANT IN ERROR.

This action at law was brought in the Circuit Court for the Southern district of Iowa, to recover a portion of certain freight charges paid by plaintiff to defendant for transportation of corn and oats from certain Iowa stations to Chicago, upon the two grounds that the charges made by the defendant for such transportation violated section 4 of the Interstate Commerce Act by exceeding (in the amount sued for) the charges contemporaneously made by defendant for transportation of like property for longer distances, and also violated section 3 of the same act by being an undue or unreasonable prejudice or disadvantage to the places in Iowa from which plaintiff made

his shipments and to plaintiff and others doing business at those places, in favor of Nebraska stations from which it is alleged that defendant made the lower rates for longer distances.

The petition as finally amended consists of four counts; and the defendant demurred to each count. The demurrer was sustained by Judge Shiras in the Circuit Court, and judgment rendered upon the demurrer for the defendant. Thereupon plaintiff took the case, upon writ of error, to the Circuit Court of Appeals for the Eighth circuit; that court affirmed, without dissent, the judgment below; and the case is here upon writ of error to the last named court.

The opinion of the Circuit Court of Appeals is found on pages 33–40 of the record.

The first four counts of the petition are alike, but the remaining, fifth, count is quite different. It will, therefore, be more convenient to treat the first four counts separately from the fifth, both in stating the alleged facts and in the argument of their legal effect.

Allegations of First Four Counts.

In the first four counts, the important allegations are as follows:

Defendant owned and operated "a certain line of railroad from the City of Chicago, in the State of Illinois, to Missouri Valley and Council Bluffs, in the State of Iowa, and at the same time said defendant owned *the majority* of the stock and by the same general officers and board of directors controlled and operated the Fremont, Elkhorn and Missouri Valley Railroad and the Sioux City and Pacific Railroad, which roads connected with the Chicago and North-Western Railway at Missouri Valley

and extended westward to points in the State of Nebraska."

(Rec., 2; 6; 9 and 10; 13 and 14.)

"By the appointment and authority of the president of the defendant's road, who was also president at the same time of the Fremont, Elkhorn and Missouri Valley and the Sioux City and Pacific Railroad Companies, one K. C. Morehouse was appointed to and held the position and exercised the authority of the general freight agent of said two last named companies."

(Rec., 2, 6, 10, 14.)

On December 30, 1877, defendant put in force from points in the State of Nebraska a freight tariff upon corn and oats, as follows:

"C. & N. W., G. F. D. No. 2927, superseding G. F. D. No. 2724, F., E. & M. V. and S. C. & P. G. F. D. 949 and G. F. D. No. 859 of 1887.

Chicago and North-Western Railway, Fremont, Elkhorn and Missouri Valley and Sioux City and Pacific Railway.

Joint tariff on corn and oats in carloads, taking effect December 30, 1887, to Rochelle, Ill., *when destined to New York, Boston, Philadelphia, Baltimore.*

From	Per 100 lbs.
Blair, Neb.	11
Kennard, Neb.	11
* * * * *	

(Here follow rates from many other Nebraska points, which are omitted as immaterial in the case.)

Prepaid. Way-bill through to Rochelle, Ill., via Missouri Valley, at rates given above. *For rates from Rochelle to Baltimore, Philadelphia, New York and Boston see C. & N. W. G. F. D. No. 2604, November 25, 1878, amendments or subsequent issues.*

H. R. McCULLOUGH,
G. F. A., C. & N.-W. R.

K. C. MOREHOUSE,
G. F. A., S. C. & P. and F., E. & M. V. R's."

(Rec., 3 and 4; 7 and 8; 11 and 12; 15 and 16.)

This tariff "was never circulated or published at any of the stations on defendant's road in the State of Iowa, and no copy thereof was ever filed with the Interstate Commerce Commission, as required by law, and the existence of the same was concealed from the knowledge of plaintiff and of shippers in the State of Iowa on the line of defendant's road, and the benefits and advantages of the rates specified in such tariff were denied to plaintiff and shippers on the line of defendant's road in the State of Nebraska."

(Rec., 4, 8, 12, 16.)

The Nebraska tariff above set forth "remained in force at the several stations named therein upon the line of the Fremont, Elkhorn and Missouri Valley Railroad in the State of Nebraska from December 30, 1887, up to the first of February, 1888, and large quantities of corn and oats were shipped during said time upon and over the several roads aforesaid, to Turner and Rochelle, and thence to Chicago, Ill., at the rates therein specified, to wit: the sum of 11 cents per hundred pounds from the stations of Blair and Kennard, Nebraska."

(Rec., 4, 8, 12, 16.)

Between December 30, 1887, and February 1, 1888 (while the aforesaid tariff remained in force), plaintiff made various shipments of corn and oats over defendant's road (being the individual line of the Chicago and North-Western Railway Company) *to Chicago* from Carroll, Correctionville, Mapleton and Maple River Junction, in the State of Iowa, and charged plaintiff for these shipments at the rate per hundred pounds of 19 cents from Carroll, 21 cents from Correctionville, 21 cents from Mapleton, and 19 cents from Maple River Junction; and these charges were for less distances to Chicago (viz., 395 miles from Carroll, 475 miles from Correctionville, 461 miles from Mapleton, and 398 miles from Maple River Junction) than are Blair and Kennard, Nebraska (which are respectively 480 and 487 miles from Chicago; Rec., 2), and these charges to plaintiff from his Iowa shipping stations were "for a like, contemporaneous service, over the same line, in the same direction, under substantially sim-

ilar circumstances as the transportation of corn and oats as aforesaid from Blair and Kennard."

(Rec., 5; 8 and 9; 12 and 13; 16 and 17.)

"Plaintiff avers that the fixing of said points of Turner and Rochelle as the pretended terminus of the shipment of corn and oats under said special tariff of December 30, 1887, was a mere device to evade the law. That Turner and Rochelle were not grain markets and had no elevators or facilities for handling grain, and that said grain was intended to be and was, in fact, transported by defendant to Chicago, Illinois, and was there sold on the market, *or delivered to connecting roads for eastern seaboard points.*"

(Rec., 5; 9; 13; 17.)

The nature of the cause of action asserted by plaintiff to arise from the foregoing allegations is described as follows: "Plaintiff avers that the *charges so made, demanded, received and collected* from plaintiff, as aforesaid, were unlawful, unreasonable and unjust, and contrary to the provisions of an act of Congress entitled 'An Act to regulate commerce,' approved February 4, 1887, *in that* an unlawful preference and discrimination was practiced by defendant in favor of shippers of grain in the State of Nebraska and against this plaintiff and shippers of grain in the State of Iowa, and *in that* defendant *charged, demanded and received* a greater compensation for a short than for a longer haul in the same direction, over the same line, the shorter being included in the longer haul, and being for a like and contemporaneous service in the transportation of a like traffic under substantially similar circumstances."

(Rec., 5; 9; 13; 17.)

The relief demanded is damages "in a sum equal to the difference in the *price charged and received* (*from plaintiff*) *by the defendant* and the *rate given from Blair and Kennard, Neb.*"

(Rec., 5; 9; 13; 17.)

Allegations of Fifth Count.

The Nebraska tariff, which the preceding four counts make the basis of complaint, was in force, as already seen, from December 30, 1887, to February 1, 1888. On February 17, 1888, however. a new Nebraska tariff of the same general character was made, and this tariff is made the basis of the fifth count, which relates to the shipment by plaintiff from Carroll, Iowa, on February 20 and 21, 1888 (after the former Nebraska tariff was no longer in force).

The important allegations of this fifth count are as follows:

Defendant was at the time of the transactions set forth "a common carrier engaged in the business of transporting freight and passengers over certain lines of railroad in the States of Iowa, Illinois and Nebraska, and *in connection with other railroads in Chicago east to New York, Philadelphia, Boston, Baltimore and other seaboard points*, as more particularly set forth in the first count of this petition."

(Rec., 17.)

Defendant, "*combining together with certain other railroad companies operating roads east of Chicago to the City of New York and other seaboard points* in connection with the said K. C. Morehouse, as named in the former counts of this petition * * * put in force on the seventeenth day of February, 1888, at all the stations on the said Fremont, Elkhorn and Missouri Valley Railroad in Nebraska * * * a certain tariff on corn and oats *destined for New York and other seaboard points*, whereby it proposed to transport, and did on and between said seventeenth day of February and first day of March, 1888, transport corn and oats from Blair and other points in Nebraska on the line of said road to New York for 36½ cents per hundred pounds, and to Boston for cents per hundred pounds, and to Philadelphia

for 34½ cents per hundred pounds, and to Baltimore for 33½ cents per hundred pounds."

(Rec., 18.)

The aforesaid tariff "only provided for and named points in Nebraska and said tariff was not furnished to or made known to the agents of defendant at Iowa points and was not filed with the Interstate Commerce Commission and was not printed or published as required by said commission or by law, and the rate therein named was denied to shippers from Iowa points on defendant's road. That the only rate on corn and oats made known during February, 1888, to shippers at Iowa points on defendant's road was a local rate to Chicago and a rate of 27½ cents from Chicago to New York and a correspondingly high rate from Chicago to other seaboard points."

(Rec., 18.)

"The said local rate from Carroll to Chicago was 19 cents per hundred pounds."

(Rec., 18.)

On February 20 and 21, 1888, plaintiff shipped 107,750 pounds of corn (Exhibit 4; Rec., 21) over defendant's road (being the individual line of the Chicago and North-Western Railway), from Carroll, Iowa, *to Chicago, Illinois;* and defendant "*demanded and received for said service* the sum of 19 cents per hundred pounds for the transportation of said corn and oats *to Chicago*, and subjected said plaintiff to a further charge of 27½ cents per one hundred pounds to transport to New York, and a like local charge to other seaboard points, *or dispose of the same at Chicago* at 27½ less per hundred than the price at New York."

(Rec., 19.)

The nature of the cause of action asserted by plaintiff to arise from the foregoing allegations is described in exactly the same way as the first four counts, viz:

"Plaintiff avers that the *charges so made, demanded*

and received and collected, as aforesaid, were unlawful, unreasonable and unjust, and contrary to the provisions of an Act of Congress, entitled: 'An Act to Regulate Commerce,' approved February 4, 1887, *in that* an unlawful preference and discrimination was practiced by defendant in favor of shippers of grain in the State of Nebraska and against this plaintiff, a shipper of grain in the State of Iowa, and *in that* defendant charged and demanded a greater compensation for a short than for a longer haul, and being for a line and contemporaneous service in the transportation of a like traffic under substantially similar circumstances."

(Rec. 19.)

Nature of Plaintiff's Actual Claim.

The claim is in all the counts of the petition, as the quotations from the petition show, that the charges *actually paid by plaintiff* to defendant *for transportation of his corn and oats to Chicago* were unreasonable, not in themselves, but *in comparison with defendant's tariff rates at the same time from Nebraska points*, for the double reason that the Nebraska rates were a less charge for a longer distance than the plaintiff paid for a shorter transportation of his grain to Chicago and that the Nebraska rates also constituted an undue preference to Nebraska shippers.

Important Omissions of the Petition.

It will be found in the progress of the argument that the petition is silent upon several points about which the facts must be known before plaintiff can be in a position to raise the legal questions that his attorney will proceed to argue, if he pursues the same line of contention that he did in the inferior courts. These omissions will best be developed in their proper connection in the body of this brief.

It will be of interest to the court to know that the tariff from Nebraska, which has been made the foundation of plaintiff's attack in the first four counts of the petition upon the rates paid by him, is the same as was likewise the groundwork of the suits of *C. & N. W. Ry. Co.* v. *Osborne*, 10 U. S. App., 430; 52 Fed. Rep., 912 (decided by Mr. Justice Brewer), and *C. & N. W. Ry. Co.* v. *Junod*, 10 U. S. App., 438; 52 Fed. Rep., 917; though in the latter cases the facts were fully developed upon a trial on the merits instead of being presented (with certain differences and several omissions) on demurrer.

ARGUMENT.

THE LAW ASSOCIATION OF PHILADELPHIA.

FIRST POINT.

NO RIGHT OF RECOVERY IS SHOWN IN THE FIRST FOUR COUNTS OF THE PETITION, WHICH ARE ALIKE IN THEIR ALLEGATIONS.

1.

The rates from Nebraska points, of which plaintiff complains, were upon shipments to the Atlantic seaboard, and the eleven cent charge from Blair and Kennard, Nebraska, as indicated in the tariff of December 30, 1887, was not an entire rate for a complete transportation, but was merely part of a single through rate for through transportation to the Atlantic seaboard; and, as the petition in its first four counts does not show what the total seaboard rate was, it follows that the petition does not show that the rates charged plaintiff from Iowa to Chicago were more

than the rates charged Nebraska shippers for a longer transportation.

1. As already said in the preliminary statement of this brief, the Nebraska tariff, set forth in the first four counts of the petition, is the same as was involved in the case of the *Chicago & North-Western Railway Company* v. *Osborn*, 10 U. S. Ap., 430. While the Osborn case record is not the record here now, it is not improper to suggest that the Osborn case was tried upon the merits, and that it would be strange if a proper construction of the language of the tariff as set out in the petition in the present case were to lead to a result concerning its character different from what was found upon the Osborn trial to be the true and undisputed meaning of the same tariff. As a safeguard, therefore, against illusory views of the tariff to be considered in this case, it is worth while to refer to the description of it by Judge BREWER in the Osborn case, as follows:

"By agreement between the defendant (Chicago and North-Western Railway Company) and eastern companies corn was shipped through to New York from Turner and Rochelle, two small stations on the defendant's road, one thirty and the other seventy miles west of Chicago, for 27½ cents, 3½ cents of which went to the defendant and the balance to the eastern companies; and by agreement between the defendant and the Freemont, Elkhorn and Missouri Valley Railroad Company, the rate from Blair to Turner and Rochelle *on corn shipped to New York, Boston, Philadelphia or Baltimore* was 11 cents. *In other words by these agreements of the several companies a through rate was fixed on corn shipped from Blair to New York and other eastern cities.*" (Page 913, in 52 Fed. Rep.)

2. Turning now to the form of the tariff (which is set forth in the preliminary statement), it will be found

by its own force to show clearly that it was not a tariff whereby 11 cents was charged for the transportation to Rochelle, Illinois, of grain consigned to that place; but was, on the other hand, a tariff giving only the means of arriving at the proper charge to be made from Blair or Kennard, Nebraska, to New York, Boston, Philadelphia or Baltimore upon corn and oats shipped to one of those seaboard points. In other words, this Nebraska tariff applied only to shipments through to the Atlantic seaboard, and the 11 cents from Blair or Kennard to Rochelle was not a rate in itself, but was merely one factor in the ascertainment of the rate to the seaboard.

The heading of the tariff indicates this: "*Joint* tariff on corn and oats in carloads, taking effect December 30, 1887, to Rochelle, Illinois, *when destined to New York, Boston, Philadelphia, Baltimore.*"

What does "destined to New York" fairly mean? A tariff schedule is, of course, brief and informal, but this language permits no uncertainty. "Destined to New York" means *shipped to New York as the destination of the shipment.* If goods were shipped to Rochelle they could not, at any rate legally, be said to be destined to New York. A second consignment or shipment would be necessary to New York before the merchandise could properly be said to be destined to the latter city. If the consignment were to Rochelle rather than to New York, then the merchandise would go no farther than Rochelle, and might never be forwarded elsewhere. A farther shipment would have to be decided upon by the owner, to go over the route of a second carrier, before the merchandise could be properly said to have New York for its destination.

The same meaning belongs to the tariff in view of the

direction at its close: "*For rates from Rochelle to Baltimore, Philadelphia, New York and Boston see C. & N. W. G. F. D. (i. e., C. & N. W. General Freight Department) No. 2604, November 25, 1887, amendments or subsequent issues.*" This shows that the shipments contemplated by the tariff were to pay those rates. Manifestly, therefore, the tariff was not for merchandise shipped no farther than Rochelle. The reference to the tariff from Rochelle eastward practically joins the two tariff sheets into one. This way of printing the tariff of December 30, 1887, was much more convenient and simple than the construction of a new, full schedule (by addition) for the various Atlantic points, and saved the necessity of reprinting every time a change occurred in the eastward rates (which are perhaps the most variable rates in the country).

The provision for waybilling to "Rochelle, Ill., via. Missouri Valley," is of no significance. A way bill is not a contract with the shipper, but merely a memorandum ticket or order for the railroad employes in handling the freight. The way bill, therefore (being a mere direction to employes), of course would not be given by the North-Western Company beyond its own road to others than its own employes; but the waybilling on eastern roads would be made by those roads themselves to their own employes. The bill of lading (or "railroad receipt" which is often given shippers and amounts to a bill of lading) constitutes the contract with the shipper; and this tariff of December 30, 1887, was applicable only when the shipping contract was for a through shipment to the seaboard. Otherwise the merchandise would not be "destined to" New York, Boston, Philadelphia or Baltimore, and would not have to pay "rates from Rochelle to" those places.

3. The opinion of the Circuit Court of Appeals upon the proper construction of this tariff is very clear and satisfactory, and is as follows:

"It is said that the petition shows affirmatively that the tariff established on December 30, 1887, was a tariff to Rochelle, Illinois, only, and that the only parties to it were the Chicago and North-Western Railway Company, the Fremont, Elkhorn and Missouri Valley Railroad Company, and the Sioux City and Pacific Railroad Company. With reference to this contention it is to be observed that the tariff sheet of December 30, 1887, set forth in the petition in the case at bar, was before this court in the case of the *Chicago & North-Western Railway Company* v. *Osborn*, and that it was there found and determined that by an agreement between the defendant company, the Fremont, Elkhorn and Missouri Valley Railroad, the Sioux City and Pacific Railway, and certain eastern companies, a joint through rate from certain Nebraska points to the seaboard was in fact established and put in force. It is true that in the case last cited we had before us other evidence than the tariff sheet of December 30, 1887, which may have aided somewhat in reaching the conclusion last stated, but we think that the tariff sheet itself which is set out in the petition sufficiently shows that an arrangement or agreement existed between the several companies last named whereby corn and oats were to be carried through from the Nebraska points named in the tariff sheet to the eastern cities therein named at a certain specified rate, and that the rate of 11 cents per 100 weight from Blair and Kennard, Nebraska, to Rochelle, Illinois, was a part of such joint through rate and not a local rate. The caption of the tariff sheet shows that the rate of 11 cents per hundred only applied when the grain was destined through to New York, Boston, Philadelphia and Baltimore, and the memorandum at the foot of the sheet shows that the total through rate was to be ascertained by the company's agents by consulting the tariff sheet of November 25, 1887, and subsequent issues for the rate from Rochelle to the eastern cities specified in the schedule. The inference is clear and irresistible

that a specific joint through rate from Nebraska points named in the tariff sheet to the seabord had been established by the several companies above mentioned, on December 30, 1887; that shippers of corn and oats from said points to the seaboard points named had the right to avail themselves of the joint through rate, and that the 11 cent rate from Blair and Kennard to Rochelle was only applicable to such through shipments." (Rec., 37, 38.)

4. The plain meaning of the tariff is not avoided by the allegations of the petition that "the fixing of said points of Turner and Rochelle as pretended terminus of shipments of corn and oats on said tariff of December 30, 1887, was a mere device to evade the law; that Turner and Rochelle were not grain markets and had no elevators or facilities for handling grain, and said grain was intended to be and was in fact transported by the defendant to Chicago, Illinois, and was there sold on the market or delivered to connecting roads for eastern seaboard points." (Rec., 5.) The statement that the fixing of Rochelle as a terminus was "a mere device to evade the law," is, of course, nothing but a legal conclusion on the part of the plaintiff. The statements that Turner and Rochelle were not grain markets and had no elevators or facilities for handling grain are wholly immaterial, and relate at most to inclusive evidential facts. As to transportation of the grain by the defendant to Chicago, it is not alleged that the grain stopped at Chicago and went no farther; but, on the contrary, plaintiff only says that it was "transported by the defendant to Chicago, Illinois, and was there sold on the market *or delivered to connecting roads for eastern seabord points.*" This latter, alternative statement (which, of course, plaintiff is not at liberty to deny as to any of the grain shipped under this tariff of December 30, 1887), is in direct accord with

the meaning of the tariff itself as argued in this brief, as determined by the Circuit Court of Appeals, and as developed after full trial in the Osborn case; and it so appears that the plaintiff himself directly admits the application of the tariff only to seabord shipments.

It is entirely consistent with the tariff of December 30, 1887, that the defendant should haul the grain beyond Rochelle to Chicago, over its own line to the latter point; and that was done under the joint Chicago and North-Western tariff (being "C. & N. W. G. F. D. No. 2604, November 25, 1887, amendments or subsequent issues") referred to in the tariff of December 30, 1887, "for rates from Rochelle to Baltimore, Philadelphia, New York and Boston." It may be once more noticed that the petition in this very respect comes again into conformity with the transaction as developed in the Osborn case. (See quotation from Judge Brewer's statement of the facts, *supra*).

The opinion of the Circuit Court of Appeals is once more very pertinent:

"Nor are we able to hold that the inference above stated arising from the language of the tariff sheet is sufficiently rebutted by the allegation of the petition, above recited, that 'the fixing of said point Rochelle as the terminus of the route under the special tariff sheet of December 30, 1887, was a mere device to evade the law,' etc. No facts are averred showing that the agreement for a joint through rate indicated by the tariff sheet in question was merely colorable, that no such agreement was ever made or acted under, and that the station agents along the line of the roads in Nebraska had received private instructions to disregard the direction to only allow the rate specified in the tariff sheet on through shipments to the seaboard. Without some such allegations as these showing that no agreement was made by the several carriers for a joint through rate, or that the directions con-

tained in the tariff sheet were secretly recalled and were not observed, we can attach no importance to the charge that it was a mere device to evade the law. That allegation standing by itself, and without the averment of facts to support it, is a mere conclusion of the pleader. Nor do the facts stated in that connection, that Rochelle was not a grain market, that the grain was not transshipped at Rochelle, but was carried through over defendant's road to Chicago, and was there delivered to the connecting roads for eastern seaboard points, serve to support it. For, conceding that it was so carried through to Chicago and there delivered to the other connecting carriers, it may nevertheless have been carried on a joint through rate given to the Nebraska shippers such as the tariff sheet indicates. In other words, the facts pleaded do not substantiate the charge that the pretended tariff agreement of December 30, 1887, 'was a mere device to evade the law.' We must accordingly conclude that the petition does show the establishment and existence of a joint through rate, such as is assumed by the demurrer, and that the eleven-cent rate accorded to Nebraska shippers was not a local rate, such as was paid by the plaintiff in error, but was a portion of the joint through rate. If such was not the meaning of the pleader, the fault lies with him in failing to make his plea more definite." (Rec., 38.)

5. When the plaintiff comes to his fifth count, he again falls into an admission of the true construction of the tariff of December 30,1887, as applying to through seaboard shipments. In this fifth count plaintiff expressly avers the making of seaboard rates from Nebraska by the defendant in connection with roads east of Chicago, *and goes on to say that this was done as more particularly described in the preceding counts.* Thus it is averred in the fifth count that the plaintiff was "a common carrier engaged in business of transporting freight and passengers over certain lines of railroad in the States of Iowa, Illinois and Nebraska, *in connection with other railroads*

in Chicago east to New York, Philadelphia, Boston, Baltimore, and other seaboard points as more particularly set forth in the first count of this petition." (Rec., 17.) Also, plaintiff says in the same count that the defendant made the seaboard rates set out in that count by "*combining together with certain other railroad companies operating roads east of Chicago to the City of New York and other seaboard points in connection with the said K. C. Morehouse, as named in former counts of this petition.*" (Rec., 18.)

6. In the first four counts of the petition, being those now under consideration, *it is in no way shown what were the amounts of the rates from Nebraska to New York, Boston, Philadelphia or Baltimore, which have just been shown to be the only rates established by the tariff of December 30, 1887.* That tariff having applied only to shipments to the Atlantic seaboard points, it follows (as the direct language of the tariff itself indicates) that the eleven cents charge, which was by the terms of the tariff to be added to the rates from Chicago eastward (as these latter might exist at the time of the shipment), was not in itself a rate made by the defendant—that is, the whole charge for a separate and complete transportation service—but was merely one element in calculating the real rate fixed by this tariff of December 30, 1887, as the entire charge from Nebraska to New York, Boston, Philadelphia or Baltimore. These through seaboard rates are not shown by the petition. As they are the only rates shown to have been made by the defendant, they are, of course, the only rates with which comparison could be made of the rates actually paid by the plaintiff for the transportation of his grain to Chicago. Conse-

quently the petition in its first four counts is fatally defective in not showing the amounts of the Nebraska seaboard rates.

II.

No comparison can be made, for the purpose of showing a violation of the long and short haul clause, between the rates paid by plaintiff for transportation to Chicago and the 11 cents charge from Blair and Kennard, Nebraska, under the tariff of December 30, 1887.

1. The 11 cents charge has been shown in the preceding charge to be not a rate, but merely one part of a rate. A charge is not a rate unless it is the total charge for a complete transportation service. The shares of different companies in a through rate are merely elements whose sum makes the through rate.

The fourth section of the interstate commerce act (and, for that matter, the third section also) contemplates a comparison of rates, and not of parts of rates or of one rate with a part of a rate. This is manifest from the language of the act; and it results equally from its purpose, for the object of both the third and fourth sections of the statute is to prevent improper discriminations between shippers, places or kinds of traffic, and the existence of such discriminations depends only upon the relative amounts which persons, places or kinds of traffic have to pay, and not at all upon the method by which those amounts are computed or the shares into which they are divided between joint carriers.

2. A part of the through rate received by one of several joint carriers as its share for hauling over its own

road is, also, for a different service from that rendered for a local rate charged for hauling over the same distance, and this difference of service, or of the circumstances and conditions of the service, forbids comparison of a rate with a part of a rate as a means of ascertaining whether or not there is discrimination. So this court has already decided.

Atchison, Topeka & Santa Fe Railroad Company v. *Denver & New Orleans Railroad Company*, 110 U. S., 667.
Union Pacific Railway Company v. *United States*, 117 U. S , 355.

3. The 11 cents specified in the tariff of December 30th, 1887, as the portion of charge corresponding to the haul as far as Rochelle, are not even shown to have been the full amount received by defendant for hauling as far as Chicago, to which place plaintiff's grain was transported for the rate paid by him. Even if plaintiff's rate to Chicago can be compared with the part of the full seaboard rate which defendant received for its part of the seaboard transportation, it still must be true that the plaintiff's rate must be compared with the full amount received by defendant for hauling as far as Chicago, and not merely with the part for hauling as far as Rochelle. It will be remembered that the tariff of December 30, 1887, beside giving the 11-cent charge, says: "For rates from Rochelle to Baltimore, Philadelphia, New York and Boston see C. & N. W. G. F. D. No. 2604, November 25, 1887, amendments or subsequent issues." This transportation from Rochelle eastward was in part over defendant's line, and it is not to be presumed that it was done by defendant for nothing. What defendant got for that portion of its own haul east of Rochelle is not, how-

ever, shown by the petition; and, therefore, even defendant's share of the seaboard rate, received by it for hauling over its own road to Chicago in the course of the seaboard transportation, is not made to appear.

The sum received by defendant out of the total charges east of Rochelle was shown on the Osborn trial to be 3½ cents, but in the present case the record fails to cover the point (See Justice Brewer's statement of facts in Osborn case.)

4. If the previous arguments under this point were neglected, it would yet remain that the eleven cents charge was not to Chicago, but to Rochelle, and that the petition wholly fails to state the location of Rochelle or its distance from the Nebraska shipping points. From this it results both that the transporation for plaintiff to Chicago is not shown to have been included within the alleged longer transportation from Nebraska, and that the distance of Rochelle from the Nebraska shipping points is not shown to have been greater than the distance from plaintiff's shipping points to Chicago. Each omission destroys plaintiff's claim.

III.

The two preceding points (I and II) establish that no violation of the long and short haul clause is shown by the first four counts of the petition, even if the rate from Nebraska be considered for the sake of argument as the individual rate of one company over its own line; but the rate from Nebraska having been, in fact, a joint through rate to the seaboard made by many different companies, including those having roads east of Chicago, while the rate paid by plaintiff for the transportation of his grain to Chicago was the individual rate of defendant company for transportation only over its own road, no comparison can be made of these joint and individual rates for the purpose of showing a violation of the long and short haul clause.

1. It has already been shown in point I that the rates with which plaintiff seeks to compare his own Chicago rates were joint rates of many companies, including carriers east of Chicago, to the seaboard. It is directly averred, on the other hand, that plaintiff's Chicago rates were charges made by defendant alone for carriage only over its own road. The point, therefore, which was directly decided by Justice Brewer in the Osborn case now presents itself.

2. The decision of this court in the "Social Circle case" (*Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S., 184) in no way overturns the doctrine of the Osborn case.

The central facts in the Social Circle case were: A joint line was established between Cincinnati and Augusta

by the Cincinnati, New Orleans and Texas Pacific Railway Company, extending from Cincinnati to Chattanooga, the Western and Atlantic Railroad Company, running from Chattanooga to Atlanta, and the Georgia Railroad Company, extending from Atlanta to Augusta. Joint rates were made by these three companies between Cincinnati and Augusta of $1.07 per hundred pounds. Social Circle is a station upon the Georgia Railroad intermediate between Atlanta and Augusta, and consequently a less distance than Augusta from Cincinnati. The rate made from Cincinnati to Social Circle, however, was $1.37 per hundred pounds, because the rate upon the Cincinnati, New Orleans and Texas Pacific Railway and the Western and Atlantic Railroad from Cincinnati to Atlanta (being the initial point of the Georgia Railroad) was $1.07, and the Georgia Railroad refused to accept for its share of the transportation from Cincinnati to Social Circle less than its regular local rate between Atlanta and Social Circle, which was 30 cents and therefore made the total charge from Cincinnati to Social Circle $1.37. *The merchandise shipped from Cincinnati to Social Circle was forwarded upon a through bill of lading*, notwithstanding the fact that the through rate was made up by inclusion of an amount equal to the Georgia Railroad's local rate from Atlanta to Social Circle, as just described. This fact that through bills of lading were actually employed to Social Circle is the first fundamental feature of the case; and the second crucial fact is that Social Circle was upon the same railroad (viz., the Georgia Railroad) as Augusta, and the transportation from Cincinnatti to Social Circle was over exactly the same roads as was the transportation from Cincinnati to Augusta. From these facts it results that

the questions were not involved whether (1) the three roads could have been compelled to make a joint line and a joint rate from Cincinnati to Social Circle because they had made a joint line and a joint rate from Cincinnati to Augusta, or whether (2) any one of the roads must measure its charges between stations upon its own road (in the transportation from one to the other of which stations no other road was used) by the amount of the joint line charges made by the three roads together. The first question was not involved because *in fact and voluntarily* the roads *employed a through bill of lading from Cincinnati to Social Circle*, and, therefore, established a joint line of the same three companies between Cincinnati and Social Circle as had established the line between Cincinnati and Augusta; and the second question was not involved because *Social Circle was upon the same road as Augusta*, and the transportation between Cincinnati and Social Circle was over the same three roads as between Cincinnati and Augusta.

The fact of the actual through billing is stated by this court as follows:

"These respondents filed answers, from which, and from the allegations of the complaint, it appeared that the complainants shipped their goods, at first class rates, by *through bills of lading* from Cincinnati to Atlanta, to *Social Circle and to Augusta.*" (Page 185.)

Again: "In the answer filed by the so-called 'Georgia Railroad Company' in the proceedings before the commission there was the following allegation: 'This respondent says that while no arrangement exists for a through bill of lading from Cincinnati to Social Circle, *as a matter of fact the shipment from Cincinnati to Social Circle by the petitioner was made on a through bill of lading*, the rate of which was fixed by adding this respondent's local rate from Atlanta to Social Circle, to the through rate from Cincinnati to Atlanta.'" (Pages 190, 191.)

The true point of decision in this Social Circle case and the entire compatibility of that decision with the Osborne case are stated thus by the court:

"The Circuit Court sought to fortify its position in this regard by citing the opinion of Mr. Justice BREWER in the case of *Chicago & North-Western Railroad* v. *Osborne*, 10 U. S. App., 430, when that case was before the United States Circuit Court of Appeals for the Eighth circuit. It is quite true that the opinion was expressed that railroad companies, incorporated by and doing business wholly within one state, *cannot be compelled to agree to a common control, management or arrangement with connecting companies*, and thus be deprived of its rights and powers as to rates on its own road. It was also said that *it did not follow that, even if such a state corporation did agree to form a continuous line for carrying foreign freight at a through rate, it was thereby prevented from charging its ordinary local rates for domestic traffic*, originating within the state.

Thus understood, there is nothing in that case which we need disagree with in disapproving the Circuit Court's view in the present case. All we wish to be understood to hold is that when goods *shipped under a through bill of lading*, from a point in one state to a point in another, are received in transit by a state common carrier, under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the act to regulate commerce. When we speak of a *through bill of lading* we are referring to the usual method in use by connecting companies, and must not be understood to imply that a common control, management or arrangement might not be otherwise manifested." (Pages 192, 193.)

It may be added that the language employed by the court seems to have received its special form somewhat from the fact that the jurisdiction of the Interstate Commerce Commission over the shipments to Social Circle was questioned upon the ground that the carriage by the Georgia Railroad from Atlanta to Social Circle was all

within the same State of Georgia; and it was therefore necessary as a basis for the commission's jurisdiction that the carriage by the Georgia Railroad should appear to be in course of a through interstate shipment. That did appear from the use of a through bill of lading. The question, however, whether there was a through contract from Cincinnati to Social Circle, in pursuance of which the Georgia Railroad did its transporting and to which the Georgia Railroad therefore became a party, was not different because it happened to be essential in the particular case to the jurisdiction of the commission from the same question when considered for the purpose of determining the right to measure the Social Circle rate by the Augusta rate from Cincinnati. If the merchandise had not been shipped from Cincinnati to Social Circle upon a through bill of lading or other through contract of shipment, but had been first shipped to Atlanta and then again shipped by a new and independent contract from Atlanta to Social Circle, then the charge of the Georgia Railroad for the transportation from Atlanta to Social Circle would neither have been within the jurisdiction of the Interstate Commerce Commission nor have been subject to limitation by the joint rate from Cincinnati to Augusta.

The doctrine of the Osborne case is, as succinctly stated by Mr. Justice BREWER, "*that a through tariff on a joint line is not the standard by which the separate tariff of either company is to be measured or condemed;*" and that doctrine, as will now be argued, is sound.

The language of the fourth section of the Interstate Commerce Act is, so far as here pertinent:

"SEC. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or

to receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, *under substantially similar circumstances and conditions*, for a shorter than for a longer distance *over the same line*, in the same direction, the shorter being included within the longer distance."

The following arguments all support the view that joint rates and individual rates are not to be compared under this section 4.

(1.) Section 1 of the Interstate Commerce Act defines the word "railroad," as used in the act, to mean "all the road in use by any corporation operating a railroad, *whether owned or operated* under a contract, agreement or lease." Obviously, under this definition two pieces of track, though continuous, are not portions of the same railroad unless they are "owned or operated" by the same company. If the word "line" in section 4 means the same as "railroad," the definition of the latter word by the first section makes it clear that a joint line formed by two or more companies, each operating its own railroad, is not the same as the single line of one only of those companies. In the case of a joint line, no one of the constituent companies owns or operates the entire line, but each company operates its own line in furtherance of the through transportation. As Mr. Justice BREWER said in the Osborne opinion:

"A joint tariff does not bind road to road in the sense that the two are used or operated by either corporation. There is neither unity of ownership nor unity of operation; but only a singleness of charge and a continuity of transportation over connecting roads."

It is difficult to see how or why section 4 is to be given a broader scope than it would have had if it had employed the language "over the same railroad," instead of the phrase "over the same line." If anything, the latter

language will be found to furnish additional indication that a joint line is not identical with each separate line owned or operated by a company whose road forms part of the joint line.

(2.) The act gives no direct definition of the word "line"; and it is used only in section 4. The popular meaning of the word, however, as applied to railroads, has unmistakable reference to the company owning or operating the line, and does not merely indicate a physical structure. Thus, when people talk of the Pennsylvania Line, or the Union Pacific Line, they mean the line operated by the company of such name. It may be safely asserted that where a given piece of track is used by several companies, any one riding over it will say that he is upon the line of that company which operates the train that carries him.

Further, the very fact that the word line is used only in section 4 of the act seems to raise a strong presumption that it means, like railroad generally in the act, the track owned or operated by a single company, for no reason is apparent why the long and short-haul clause should be given a greater comprehensiveness than the other parts of the statute, and particularly than section 3 referring to unlawful discrimination.

(3.) If the word "line" in section 4 be regarded as designating a physical line, so that the same track is always the same line, whether operated by one or another company, the provision of section 4 that the longer and shorter hauls must be over the same line becomes entirely superfluous and meaningless; for the same requirement would result from the statement of the section that the shorter distance must be included within the longer. The several restrictions put upon the rule of section 4 by the

carefully guarded language of the section are all important and none of them meaningless. No construction can be allowed that will reduce the qualifying words "over the same line" to nothingness. As the shorter distance, however, cannot possibly be included within the longer distance unless the same physical track is used, it was wholly meaningless to add that the transportation must be "over the same line," unless the line means something else than physical structure.

(4.) The same view is enforced by section 6, relating to the preparation and publication of tariffs. That section, beyond any question, is intended to comprehend all kinds and methods of transportation within the statute, and it distinctly and fully separates individual lines from joint lines, and provides a different rule of treatment for these two kinds of line. This section was amended by the act of March 2, 1889, but only in details, and the fundamental distinction between individual and joint lines was maintained by the section in its original as well as in its amended form.

The first half of this section 6 requires "that every common carrier subject to the provisions of this act shall print and keep open to public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and are in force at the time upon its route," and then provides that these schedules must be "posted in two public and conspicuous places in every depot, station or office of such carrier, where passengers or freight, respectively, are received for transportation, in such form as they shall be accessible to the public and can be conveniently inspected." It might be that, if there were nothing more in the section, these provisions

would be asserted to apply to joint lines—just as plaintiff claims with reference to section 4. An argument might be made, too, from the fact that the section refers to the rates in force at the time "upon its *route*," instead of saying "upon its railroad," just as section 4 says "over the same line" instead of saying "over the same railroad." The analogy between sections 4 and 6 seems to be perfect, and the above-quoted language of the latter section ought to apply to joint lines if the language of section 4 does. Any such claim with reference to section 6 is, however, absolutely prevented by the last half of the section, which goes on to treat joint lines by themselves andto apply to them wholly different rules. These provisions concerning joint lines are:

"And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said commission. Such joint rates, fares and charges, on such continuous lines so filed as aforesaid shall be made public by such common carriers when directed by said commission, in so far as may, in the judgment of the commission, be deemed practicable; and said commission shall from time to time prescribe the measure of publicity which shall be given to such rates, fares and charges, or to such part of them as it may deem practicable for such common carriers to publish, and the places in which they shall be published."

We thus see that section 6 furnishes most forcible arguments. In the first place, it uses "route" in the sense of "railroad," as defined in the first section of the act, viz., the road owned or operated by a single company. In the second place, the lines or routes used for joint transportation are assiduously and distinctly de-

scribed as "continuous lines or routes," and are never included within mere general language referring to carriers, railroads, or routes. In the third place, rates for joint tariffs are everywhere spoken of as "joint rates, fares and charges," in distinction from the individual rates intended when joint rates are not explicitly designated. In the fourth place, fundamentally different rules are prescribed for the treatment of individual and joint rates; and, as respects the preparation and publication of tariffs, individual and joint lines are subjected to rules radically unlike. Why such different treatment of individual and joint charges, if the statute views them as upon the "same line"?

(5.) If the long and short-haul rule of section 4 had been intended to justify and require the comparison of individual rates with joint rates, and the test of one by the other, language would and should have been used to make that unmistakable. The act everywhere else explicitly mentions joint rates when they are in mind. Such rates were just as common and well known before the passage of the interstate commerce act as they have been since. As Judge BREWER said in the Osborne case:

"Again, at the time of the passage of this act joint through tariffs were well known, as well as the fact that they were generally less than the sum of the local tariffs and not distributed between the several companies making them according to the mere matter of mileage. In this act joint tariffs are recognized, and if Congress had intended to make the local tariffs subordinate to or measured by the joint tariffs, its language would have been clear and specific."

It should be remembered, too, that this long and short haul clause is a novel piece of legislation, and in its nature a largely arbitrary test of rates. No such provision has ever existed in England, in the statutes of which

country are found prototypes of most of our act's provisions. It is not to be readily supposed that Congress intended to stretch such a new and rigid provision beyond the point of controlling each separate carrier's own separate rates.

The wisdom of any such long and short haul rule has always been warmly assailed by those best versed in transportation questions; and that section was the theme of the widest and most earnest contention in the debates upon the passage of the law. As the long and short haul clause did pass with the rest, it cannot be denied such force as may clearly belong to it; but it should be confined within such scope as it can claim through undeniable meanings of its language. Judicial construction should not expand the experiment.

(6.) Plaintiff has appealed to the congressional debates, and most unfortunately for his contention. It can be shown by the utterances of Senator Cullom, the author of the bill, and of the leading members of the conference committee which gave the bill its final form, that they entertained the distinct view that individual and joint-line rates are not to be compared. We shall follow plaintiff briefly into the debates, both because of plaintiff's own recourse to that source of information and because it will be valuable to learn that the decision in the Osborne case was not an invention of a new and strange theory, but was a judicial construction of the statute in full accord with the views and purposes of the most prominent supporters of the law in Congress. Our quotations will be confined to short statements on the very point in hand.

Senator CULLOM said:

"The limitations placed upon the prohibition that is made are very significant, and they must not be over-

looked. They require that in determining the sum that may be charged for a shorter as compared with a longer distance, the comparison must be made—

1. Between shipments 'of like kind of property.'
2. 'Under substantially similar circumstances and conditions.'
3. 'Over the same line.'
4. 'In the same direction.'
5. When the shorter is 'included within the longer distance.'

When the act is to be applied in any given case to measure the charge that may be made for any distance, as compared with a longer distance, all of these limitations must be taken into account, and they must all apply to the case—not three or four of them, but all of them. The first, fourth and fifth of these limitations do not appear to call for any explanation, but the meaning of the second and third may need some explanation."

(Here is omitted a paragraph concerning the meaning of "similar circumstances and conditions.")

"So far as any one railroad company is concerned, therefore, the sum which it may charge for a haul from one end of its railroad to the other end becomes the maximum amount it can charge for any shorter haul over that road in the same direction and under substantially similar circumstances and conditions when the shorter distance is included within the longer.

But the question which seems to trouble those who object to the section as it stands is whether the maximum thus fixed is the sum which a railroad company charges upon shipments originating at and destined to points upon its own road, or whether the maximum is the sum which it accepts as its share of a through rate upon shipments passing over its road which originate at or are destined to points upon another road. It seems clear to me that there can be but one answer to that question.

In the first place, the measure of the charge that may be made for the shorter distance is the sum that is charged for a longer distance over the same line and under substantially similar circumstances and conditions. The rates fixed by a railroad company between points upon its own road are clearly rates upon one line, or, in the

terms of the bill, the 'same line.' A railroad company can make and control the rates upon its own road, and the section says that in making such rates the short-haul principle shall be observed. A railroad company can not control rates over the road of another company. But when two or more companies unite in making joint rates over their respective roads, they become in the eye of the bill one line, and this section says that the short-haul principle must be observed in making rates over that line, the two or more roads composing it being, within the meaning of the section, the same line so far as such joint rates are concerned. The word railroad is used throughout the bill and the word line is used only in this section."

(Congressional Rec., Jan. 10, 1887, Vol. 18, pages 486, 487.)

Again:

"Mr. CULLOM: The joint through rates which are made by two or more railroad companies between points on their respective roads are made over an entirely different and distinct line from that over which any one of the companies individually makes rates. And they are also made under different circumstances and conditions from those which govern and determine rates made over a single railroad.

The two transactions are separate and distinct, neither being necessarily governed by the other. Furthermore, the making of joint through rates is specifically recognized by the bill in the section requiring publicity of rates, and nowhere in the bill can anything be found in relation to the division of a joint rate by connecting roads. I am satisfied, therefore, that the only construction that is warranted by the language of the section is the one I have given it, and that, instead of requiring rates to be measured by the percentage of a through rate which a road accepts, or of requiring through rates over connecting roads to be an aggregation of the local rates over each road, as some have claimed, the section as it stands simply requires that each railroad company shall observe the short-haul principle as to its own rates, and that the same principle shall also be observed by a combination of rail-

roads as to the joint through rates between points upon their respective roads agreed upon by such combination."

(Congressional Rec., Jan. 10th, 1887, Vol. 18, page 487.)

Senator PLATT said:

"I am told that there is fear in many quarters that this construction will be put upon it: That where two or more independent lines of railroad (independent in ownership and operation) contract with each other to forward freight over the entire line so made up, and for each independent link the railroad company owning and operating it to accept a certain proportion of the through freight as its share, that proportion which it so agrees to accept under these circumstances will be made the measure of the charge upon freight shipped over its own road or any portion of it. I do not think that such can be the construction of the bill.

Every word must stand by itself. It is upon the company's own road that the short-haul clause takes effect. If a number of independent companies, having independent lines which together form a continuous through route, contract as to the freights which shall go over these routes, then they, as contracting parties, are bound as to freight which is shipped over these roads as to the price, and may not charge more on freight sent under contract between those points for the shorter than for the longer distance; but the share which each road may receive for carrying such through freight does not, in my judgment, furnish the measure by which any one of those independent and independently operated companies is to measure the rate for other freight upon its own road."

(Congressional Rec., Jan. 5th, 1887, Vol. 18, page 360.)

Senator SPOONER said:

"The phase of the question which troubles me, because necessarily left somewhat to argument, and in my view dangerous if wrongly held, is whether the proportion which the railway company whose road constitutes one of

several links in a line of transportation receives or accepts a through rate upon a mileage basis, is to be taken as the maximum charge which it may make for the transportation of similar property over its own road as an independent shipment. Everyone knows that it has grown to be an essential part of transportation that the terminal carrier makes through bills of lading over its own and connecting roads, giving to each connecting company its proportion of the through rate, upon a mileage basis. This method cannot well be dispensed with without detriment to the public interest.

If the amount of a through rate which the connecting carrier accepts as its proportion, upon a mileage basis, is to constitute the maximum of that carrier's charge for an original shipment over its road, manifestly the present method must be abrogated, for no carrier would permit, or could be expected to permit, another to fix for it the maximum charge for transportation over its own road; and the result would be that the through rates would hereafter be the sum of the charges made by each carrier over its own road as an independent shipment. This would be disastrous to the people.

But it has seemed to me quite clear, for several reasons, that the section would not be so construed. I think the service which a connecting carrier renders in transporting a carload of freight over its road as part of the through line, and for which it accepts its proportion, upon the mileage basis, of the through rate fixed by another carrier, could not well be held to be 'under substantially similar circumstances and conditions' as an original shipment of like kind of property from one of its termini to the other. There is certainly a difference in fact. Ordinarily the carrier to which the freight is first delivered, and which makes the through rate, furnishes the car, stands the demurrage, loads the freight, and generally the liability which the first carrier assumes is different from that which is assumed by the connecting carrier. As a rule the first carrier may be sued for the default of the connecting carrier, but the connecting carrier can only be sued for default upon its own road. There are doubtless other differences which practical railroad men could readily point out.

Again, this bill distinguishes very clearly between a shipment over the carrier's own road and a shipment over a line made up of several roads operated by different railway companies.

The mandate of section 6, that the common carrier shall print and keep for public inspection schedules showing the rates and fares and charges, etc., applies only to its 'railroad as defined by the first section of this act,' that is, 'all the railroad in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or a lease.' There is no requirement, absolute, as in the case just put, for the publication of rates for transportation over continuous lines or routes operated by more than one carrier. Even where joint tariffs are made, there is no requirement for their publication, except so far as may 'in the judgment of the commission be deemed practicable.' The bill deals with the line as distinct from the railroad, and it is hardly to be supposed that a court, or the commission, in view of the construction which the conferrees of the senate, all lawyers, who aided in framing the original bill, give it in this regard, and in view of the considerations which have been suggested in support of that construction, would construe it so as to put an end against the interest of the people to through bills of lading."

(Congressional Rec., Jan. 14th, 1887, Vol. 18, Appendix, pages 38 and 39.)

Representative DIBBLE said:

"There is another part of this act, Mr. Speaker, which I approach with some hesitation, as there is in it a good deal of that ambiguity which is one of the objections to this act. I refer to the provisions with reference to the long and short haul. Now, I agree with the distinguished gentleman from Georgia, who so ably advocated the adoption of this report two days ago, in his definition of the word 'line' in the fourth section of this act. I agree with him where he says in relation to that—

'I do not understand that the word 'line' as used in that section means anything different from road as defined in the bill:

'The term 'railroad' as used in this act shall include

all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease.'

We agree, then, that the word 'line' is synonymous with the word 'railroad,' and if that be the case, I would call the attention of the House to the fact that some of the instances which have been cited in this debate would not find in this act anything applicable to them. An instance was cited of 76 cents a hundred for freight from New York to New Orleans, and $1 a hundred on freight from New York to Atlanta. Why, Mr. Speaker, if the word 'line' means 'railroad,' neither the route from New York to New Orleans nor the route from New York to Atlanta is embraced within the terms of the bill, because there is no provision in the fourth section for a long and a short haul over connecting lines, but the language refers only to transportation over the same line."

(Congressional Rec., Jan. 20th, 1887; Vol. 18, page 841.)

Senator HARRIS, another member of the conference committee, replied as follows to Senator Aldrich:

Senator ALDRICH: "Between New York and San Francisco ten different railroad companies have joined in a contract, which constitutes a distinct, separate line from San Francisco to New York. Now, is it a new line when nine of those join in that contract, and are they exempted from the provisions and limitations which apply to the line of ten companies? And if eight, if seven, if six, can each one of these companies make a new contract with new rates which have no limitations to the nine or ten? That is what the senator from Illinois said, that then you can fix your rates entirely separate and apart from the line. If these are separate and distinct lines, nine can charge more than ten; eight can charge more than ten; seven can charge more than ten; until you get down to two, and they can charge more than ten, and then you only have one line."

Mr. HARRIS' reply was:

"The case I put originally, it seems to me, clearly and

distinctly answers the senator's question. If this long line, being constituted with four separate, distinct and independent lines, has contracted for through freight and through freight only, I do not see that their contracts or the existence of that line would affect any other than the through shipments; but if, in their contract constituting that long line composed of the four distinct lines, they fix one rate from San Francisco to New York, another from Ogden to New York, or any of the intermediate points including more than one of the lines to carry the freight, then the short-haul provision would apply to the maximum charge fixed by that line upon which the freights were to be transported."

(Congressional Rec., Jan. 10th, 1887, Vol. 18, pages 489, 490.)

Plaintiff's counsel attempt, in the appendix to their brief, to explain away the remarks of Senators Cullom and Harris; but that cannot be done. Senator Cullom's statements are explicit, and Senator Harris', while somewhat less direct, admit of but one rational interpretation, viz.: that joint line rates control, under section 4, only other rates upon the same joint line, and not individual rates of the several members of the joint line. Of the quotations from Senator Morgan, Mr. Crisp and Mr. Burrows, made in the appendix to plaintiff in error's brief, it need merely be said that they were upon the general question of the justice or expediency of limiting shorter distance rates by longer distance rates upon the same line, and had no reference whatever to the question: What is the same line? They, therefore, have no pertinency.

(7.) If individual and joint rates can be compared under section 4, they can equally be compared under section 3, which forbids undue and unreasonable preferences between persons, places or kinds of traffic. No good reason can be advanced for comparison of such different

kinds of rates within one section and not within the other. Indeed, section 4 is manifestly but a special case of section 3, the legislature having thought it best to declare as matter of law that a violation of the long and short haul clause, as contained in section 4, shall be considered an improper discrimination between places. Section 3 gives no definition or test for discriminations that shall be considered undue or unreasonable, but leaves the question to be determined as a matter of fact under the circumstances of each case. Such would be the rule as to all cases of alleged discrimination but for the particular test established by section 4 as to discrimination between places; and it remains true even of discriminations between places, notwithstanding section 4, that it is a question of fact (as this court has already declared) whether they are undue or unreasonable discriminations, unless the specific prohibition of the long and short haul clause is violated. It is, therefore, apparent that section 4 simply provides a particular test for determining whether local discriminations are improper; and this test furnishes but a special case within, and applies to only a small part of, the local discriminations which section 3 forbids, if for any reason, whether transgression of the long and short haul clause or some other reason, they are "undue or unreasonable."

Can it for a moment be thought that the rates of every joint line can be compared with the individual rates of each member of the joint line for the purpose of seeing whether they create an undue or unreasonable preference between places within section 3? Any such rule would be wholly impracticable and would lead only to the most unfortunate and hurtful uncertainty and confusion. It is a sufficiently difficult process for a railroad company in

establishing its rates, or for a court in judicially reviewing them, to compare and test the relative adjustment of the various rates of a single company. It will become wholly impossible for a railroad company to know anything about the relative propriety of its rates, if they must be measured not only by the other rates established by that same company, but also (in case they are joint rates) by all the individual rates of all the other companies that are parties to the joint rate. If a certain railroad proposes to make a joint rate with two or three other railroads, what means of a practical sort has the first named railroad, or can it have, for knowing all the individual rates of the other two or three companies? And if it were supposed to have the means of knowing all the individual rates of all the other companies uniting in the proposed joint rate, what means has it of knowing the circumstances and conditions entering into and surrounding the individual rates of the other companies and determining the proper adjustment of those individual rates to the joint rate? Nothing could be more impracticable or detrimental, both to the railroads and the public, than to establish such a requirement as plaintiff seeks to find in the interstate commerce law, that any company entering into a joint rate must know the amount of all the individual rates of all the other companies uniting in the joint rate and must know the extent, character and qualities of the individual services of those other companies for which their individual rates are established, and must then be responsible for the propriety of the joint rate in its relation to the other companies' individual rates.

(8.) It has been stated in the preceding paragraph, and we believe cannot be doubted, that if individual and joint rates can be compared under section 4, they can likewise

under section 3. As section 4 makes only the greater charge for a shorter distance unlawful, and as a joint rate is usually for a longer distance than the local rates of the companies uniting in the joint rate, it results ordinarily that the only company which can be assailed under section 4 by reason of charging more for a shorter distance is the company that makes the local rate, beside being a party to the joint rate; but if section 3 (as well as section 4) may be violated through a comparison of local and joint rates, it will often occur that one of the parties to the joint rate will be assailed and criminally punished because its joint rate is found to be out of proper relation to the individual rates of other parties to the joint rate, with the establishment of which it has had and could have nothing to do. Thus, suppose that the North-Western and Union Pacific Companies united in a joint rate from Denver to Chicago, beside having, of course, each its own local rates upon its own road. If joint and individual rates can be compared the North-Western Company can be attacked upon the ground that the joint rate to which it is a party is either unduly high or unduly low with reference to the local rates on the Union Pacific road, over the establishment of which the North-Western Company has no authority. It it not necessary, in order to make a case under section 3, that the local short distance rate should exceed the longer distance joint rate. Even though that be not true, there may be an undue or unreasonable discrimination between places in consequence of relative inequality of their rates. Is such a construction of the act permissible?

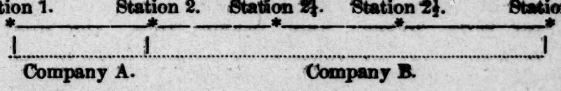
It is not a sufficient answer to the argument just made that, while the Union Pacific Company could be punished for the local discrimination arising from the relation of its local rates to the joint rate, the North-Western Com-

pany could not be so punished, because it is a party only to the joint rate. The aim of section 3 is a proper relative adjustment of all rates which it makes comparable. If joint and individual rates can be compared, that fact shows that the section insists upon a proper adjustment of such rates in relation to each other; and if their relative adjustment be improper, the discrimination results as much from the North-Western Company's maintenance of the joint rate as from the Union Pacific Company's maintenance of the local rate. The North-Western Company has as much right to remove the discrimination by discontinuing the joint rate as the Union Pacific Company has by discontinuing the local rate. If, therefore, the North-Western Company does not discontinue the joint rate, but continues it notwithstanding the fact that its existence creates a local discrimination, why is not the North-Western Company just as responsible as the Union Pacific Company for a violation of section 3? Such is the consequence that follows if it be allowable that joint and individual rates can be compared; and the only way to avoid it is by holding fast to the doctrine (which all arguments concur in supporting) that no such comparison can be made.

It is not to be overlooked that in the supposed illustrative case of a joint rate of the North-Western and Union Pacific Companies from Denver to Chicago, which fails to be properly adjusted in relation to the Union Pacific local rates, there is a violation of section 3 (in case the two different kinds of rates are supposed to be comparable), whether the Union Pacific locals were already in existence at the time of establishment of the joint rate or were put in force after the joint rate. If the Union Pacific local existed when the joint rate

was made, then either and both of the companies violated section 3 by making the joint rate and so creating the local discrimination. It cannot be said that one of the companies was guilty and the other innocent; and yet this makes the Northwestern Company responsible because there was in existence a rate of the Union Pacific Company with the establishment of which it had nothing to do and of the existence of which it had no certain means of knowledge and concerning the character of which and the proper relation of it with the joint rate the North-Western Company could have no adequate means of determining. On the other hand, suppose that the Union Pacific local was established after the joint rate was made. The result is, if anything, more unjust than before. The joint rate, theretofore innocent, becomes unlawful, and because of the discrimination resulting through comparison of it with the new local rate. A technical responsibility rests upon the North-Western Company because of its failure to discontinue the joint rate under such circumstances, though, again, it has no reason to know of the existence of the Union Pacific local rate and no means of judging its character or its proper relations to the joint rate.

(9.) With direct reference once more to section 4, it may sometimes happen that the joint rate will be for a shorter distance and of larger amount than the local rate. Suppose a case such as indicated upon the diagram below:



where company A has a road from station 1 to station 2, and company B has a road from station 2 to station 3 with intermediate stations 2¼ and 2½. Suppose, farther,

that company A gives company B a trackage right over its road, whereby the latter company is permitted to operate its own trains through from station 1 to station 3, and that a joint arrangement is made between the two companies for a joint line and a joint rate from stations upon the road of company A to the intermediate stations 2¼ and 2½ upon the road of company B. In such cases (as the long through rates are usually most exposed to competitive reduction and so go lowest) the joint short-distance rate may well become higher than the individual long-distance rate. If that be so, is company A (which by the supposition is a party to the higher short-distance joint rates) to be criminally liable under section 4 because company B makes its individual long-distance rate from station 1 to station 3 lower than the joint rate? If joint and individuals rates can be compared under section 4, there is no escape from the conclusion that in the supposed case company A has violated the section, notwithstanding the fact that it has no control over or connection with the individual rate of company B from station 1 to station 3.

Further, the individual rate of company B from station 1 to station 3 may have been higher than the joint rates to intermediate stations when the latter were established, and have been lowered by company B afterward so as to bring the case within the long and short-haul clause. Company A will be none the less responsible for a violation of that clause; for it has the power to discontinue the joint rates as soon as company B makes its own long-distant rates lower; and, besides that, the question whether the joint rates and the individual rates in the supposed case are "over the same line" is entirely independent of the time when the individual rates of company B from station 1 to station 3 are lowered. If the

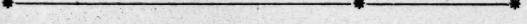
individual and joint lines are the same line at one time, they are at another time, and all the time.

The illustration just given has been made for the purpose of showing the entire possibility that a joint rate for a short distance may be higher than an individual rate for a longer distance, with the result (if the individual and joint rates can be compared) that one of the parties to the joint rate may be held criminally responsible for a violation of section 4, though it has no means of knowing or judging or comparing with the joint rate the individual rates of the other company, through comparison with which the joint rate is shown to be unlawful.

(10.) An analogy in support of the view that a joint line is not the same line with the individual line of its members may be found in the view that a partnership is changed when any of its members change, so that though the majority, or even all but one, of the members of a certain partnership remain in the firm as reorganized, the new firm is entirely distinct from the old firm by reason of the change of even one of its members. The rule should not be different in reference to combinations of railroads in the establishment of joint lines and joint rates.

(11.) Apart from the question of identity of line, there can be no comparison of individual rates and joint rates for the reason that they will never be "under substantially similar circumstances and conditions." These circumstances and conditions, which the act requires to be alike, are, of course, such as surround and affect the services, and those services (in order to be compared) must be the real services of each carrier. It results that the circumstances and conditions are dissimilar, and

section 4, as well as section 3, is by that fact displaced in the case of attempted comparison of individual and joint rates, unless the services of that company whose individual and joint rates are sought to be compared are alike. Such is never the fact. The following simple diagram will illustrate.



The service performed by the *first carrier* in a joint line will differ from its service in transporting locally over the same track, as follows:

(*a.*) In the local transportation, the company must furnish cars, and gets no compensation except the regular freight rate; whereas in its part of the joint transportation the company will by uniform custom either receive mileage (in addition to the freight rate) or will use the cars of its connecting carrier and itself pay mileage.

(*b.*) In local transportation over its own line the company must, of course, have a freight depot and terminals suitable for delivery at the station at the end of its line, where the local freight is to be delivered; whereas in transportation over the same track in course of a longer joint transportation the first company need use no freight depot or terminals suitable for ordinary delivery at the junction station.

(*c.*) In its local transportation the company must unload at the end of transportation; whereas in the through joint transportation the first company will have no unloading to do.

(*d.*) In local transportation the company has to bear considerable warehousing expense of one kind or another until consignee removes his freight, and has serious risk in determining the identity of consignee and avoiding de-

livery to the wrong person. Both this expense and this risk are much more serious in the local transportation than in case of delivery of the car upon the tracks of the connecting carrier in a joint line.

On the other hand, the service performed by the *last carrier* in a joint line will differ from its service in transporting locally over its own line as follows:

(*a.*) The difference is the same with reference to cars and mileage as in the case of the first carrier.

(*b.*) The company must have a depot and terminals suitable for ordinary delivery at its initial station for use in local transportation; whereas, in the joint transportation it will need no depot and no such terminals at the station where it receives the freight.

(*c.*) In local transportation the company must load into its cars at its initial station; whereas in joint transportation it will have no loading to do.

The service performed by an *intermediate carrier* in the course of a joint transportation differs from its service in transporting freight locally over its own line as follows:

(*a.*) The difference is the same with reference to cars and mileage as in the case of the first and last carriers in joint transportation.

(*b.*) Such intermediate carrier has neither loading nor unloading to do.

(*c.*) Like the first carrier, it has a different and less expense in warehousing and risk in delivering in the case of joint transportation than in local transportation.

These differences are radical and universal. They constitute an independent reason why individual and joint rates are not to be compared. The differences are in

each respect in favor of the joint transportation and against the local transportation, and they, therefore, justify the company in whose services they inhere and whose interest and policy they affect in making different rates jointly and locally. It will not do to say that, notwithstanding the difference in each company's services, it can not charge more locally because each element of its service locally finds a corresponding element of service *on the part of another company* in the joint transportation, for no one of the companies had any interest or concern in what any other of the companies has to do in the service rendered by it, or in the compensation which it receives for such service. The fact can not be ignored that in a joint transportation no one of the companies moves or handles the freight off its own line, and the service of each stops with its own line. As already stated, the services which are to be compared in the inquiry whether their circumstances and conditions are alike must both be services of the same company; and it is violating the actual truth and practical character of the transaction to say that each member of the joint line performs the entire service of the complete joint transportation. Only a fictitious and impractical view of the transaction can give it that form, and the long and short haul clause (not to say the entire act) must be deemed to regard various sorts of transportation as they are actually done and in the light of the real facts, rather than any possible technical theories.

(12.) The Osborne case was decided in the Court of Appeals in 1892. It found general and repeated judicial approval. So sar as we know, no court has declined to adopt its rule; and indeed there has been practical acquiescence in the decision on all hands. The following cases are instances of the rule's reiteration:

United States v. *Wheeler*, 53 Fed. Rep., 229.
Tozer v. *U. S.*, 52 Fed. Rep., 917.
Interstate Commerce Comm. v. *C., N. O. & T. P. Ry. Co.*, 56 Fed. Rep., 925.
Behlmer v. *L. & N. Ry. Co.*, 71 Fed. Rep., 835.

During the four years, also, since the Osborne decision the rates of the entire railroad system of the country have been widely adjusted in view of that decision. Not only the authority of the judge making the decision, but the unquestioning adherence to it of the Federal courts generally, gave the strongest, and for the time the only possible, support to the rule. An overthrow of that rule now would work the most serious and widespread disturbance and hardship. Perhaps nothing could more unsettle the entire rate situation of the country.

Nor should it be forgotten that cheap long-distance rates, upon joint lines, are of the highest value, and indeed indispensable to the business interests of the country. Nothing can be of more importance, either to the producing regions of the west and south or to the receiving and distributing centers of the east. Only by cheap through rates can the enormous distances of the United States be practically conquered, and the country commercially unified. It cannot be necessary to enlarge upon the impolicy of hindering in any way such cheap through rates; and nothing can hinder them more than the construction of sections 3 and 4 of the Interstate Commerce Act (for in reference to the question in hand they will not bear different construction) in the way for which plaintiff in error contends. The recent history of railroads and common knowledge of all prove, if anything

can be proved in practical affairs, that railroad rates have gone as low as they can go under existing transportation conditions; and in cases where the local rates of a member of a joint line happen to be higher than some of the joint rates, it may surely be expected that the result of giving the long and short haul clause a forced application to such case will be to raise the through rates at the expense of the entire country, instead of driving the local rates below the general rate level now existing in the country and under which so large a part of the railroads have proved financial failures.

IV.

The preceding points establish that the first four counts of the petitian show no liability under Section 4 of the Interstate Commerce Act. They are equally insufficient under Section 3 of the act.

1. Any prejudice to himself or preference to others that plaintiff may claim must be upon the theory of a local discrimination against the points from which plaintiff made his shipments. It is not averred that plaintiff was charged any more than other persons were charged for like shipments from the same shipping points and to the same destination; nor is it averred that there was any improper relation between the rates on grain and the rates on other commodities.

2. Plaintiff's theory, so far as he relies upon section 3, must be that the rates charged him for transportation from various Iowa shipping stations to Chicago were unduly high in comparison with the rates from the Nebraska

shipping stations mentioned in the tariff of December 30, 1887, to the seaboard.

3. Point I is again applicable:

(1.) The tariff of December 30, 1887, was a tariff to the seaboard, as already argued.

(2.) The seaboard rates are nowhere averred in these four counts.

It is equally impossible, therefore, to institute a comparison under either section 3 or section 4 between plaintiff's rates from Iowa to Chicago and the Nebraska rates to the seaboard.

4. Point II, also, again applies—that plaintiff's rates cannot be compared with the 11 cent charge specified in the trariff of December 30, 1887, for

(1.) As already argued in point II, the 11 cent charge was not a rate, but merely a partial factor in the seaboard rate.

(2.) Transportation over a given distance in the course of a longer transportation is not the same service as a local transportation over the same distance, and not beyond.

(3.) The 11 cent charge is not shown to have been all that defendant received for the entire service done by it in hauling as far as Chicago, in the course of the seaboard transportation from Nebraska.

(4.) The location of Rochelle is not at all averred; and its distance from Nebraska shipping points is nowhere stated.

(5.) There is no allegation that, in fact, plaintiff's shipping stations in Iowa were subjected to an "undue

or unreasonable prejudice or disadvantage," or that any other place was given any "undue or unreasonable preference or disadvantage." Those are facts that must be alleged as such.

(6.) As already argued, also, individual and joint rates can no more be compared under section 3 than under section 4.

The inferior Federal courts have often held that such comparison is forbidden under the former as well as under latter section.

Tozer v. *United States*, 52 Fed Rep., 917.
Interstate Commerce Comn v. *C., N. O. & T. P. Ry. Co.*, 56 Fed. Rep., 925.

(7.) No facts whatever are shown in support of any charge of discrimination against the stations in Iowa from which plaintiff made his shipments, except those which are asserted to show a violation of the long and short haul clause; and if that was not transgressed, no illegality whatever is shown.

V.

Plaintiff's shipments were all actually made to Chicago—and not to the seaboard—and the petition charges only that the rates actually paid by plaintiff for the transportation to Chicago were unreasonable in comparison with the rates upon grain shipments from Nebraska to the seaboard under the tariff of December 30, 1887. The petition does not assert that plaintiff is entitled to damages upon the theory that he was deprived of the privilege of shipping to the seaboard on a joint rate, of defendant and the roads east of Chicago, not greater than the Nebraska-seaboard rate; nor could any such theory succeed, if the petition had advanced it.

1. The petition avers, as already quoted in the preliminary statement of this brief, "that *the charges so made demanded, received and collected from plaintiff as aforesaid (i. e., for the actual transportation from Iowa to Chicago)*, were unlawful, unreasonable and unjust, and contrary to the provisions of an Act of Congress entitled 'An Act to Regulate Commerce,' approved February 4, 1887, in that an unlawful preference and discrimination was practiced by defendant in favor of shippers of grain in the State of Nebraska and against this plaintiff, a shipper of grain in the State of Iowa, and in that defendant charged, demanded and received a greater compensation for a short than for a longer haul in the same direction, over the same line, the shorter being included in the longer haul, and being for a like and contemporaneous service in the transportation of a like traffic under substantially similar circumstances." (Rec., 5.)

This is not a claim that plaintiff wanted a seaboard rate and was denied a joint rate to the seaboard like that which Nebraska enjoyed. It does not assert that the plaintiff desired to ship to the seaboard at all. The complaint is

of the rates actually made upon plaintiff's actual shipments to Chicago, not that the plaintiff was refused a joint rate to the seaboard.

Further than that, these counts of the petition aver that plaintiff's grain transported to Chicago "*was there sold on the market* or delivered to connecting roads for eastern seaboard points." (Rec., 5.) Under this form of allegation it does not appear but that all the grain was sold in Chicago. It is not shown that any went to the seaboard. And if any did go beyond Chicago, it was upon a separate shipment after having had the opportunity to try the Chicago market.

2. If the specific charge of the petition be disregarded, it is again a fatal objection that the amount of the Nebraska-seaboard joint rate is not averred; and there is, therefore, no showing that if plaintiff had wished to get his grain to the seaboard, he could not have done it as well upon the established local charges to Chicago, and from Chicago to the seaboard.

3. The petition also omits to show what was the local rate from Chicago to the seaboard, and for this farther reason it fails to show that plaintiff could not have shipped to the seaboard upon the sum of the local rates as well as he could upon the Nebraska-seaboard joint rate.

4. It would not follow, anyway, that defendant was bound to establish a joint rate from its Iowa stations to the seaboard, in connection with the lines east of Chicago, because it had joined in a joint rate from various Nebraska points to the seaboard; for—

A. Even the same lines that establish a joint rate be-

tween certain places on their roads are not bound for that reason to make a joint line between all places upon their roads.

B. And in the present case the Elkhorn Company and the Sioux City and Pacific Company were parties to the Nebraska-Seaboard line, and the fact that the North-Western Company made itself by its contract an intermediate carrier in that joint line certainly could not require it individually and separately to join with the lines east of Chicago in a joint line from places upon its own road.

Under A:

(1.) The Social Circle case involves no decision that if railroads make a joint rate between certain places they must make joint rates between all places upon their roads. That case has already been considered in this brief, and the fact was pointed out that the roads which established a joint line upon traffic from Cincinnati to Augusta had, *in fact*, accepted and transported the freight from Cincinnati to Social Circle (the charges upon which were the subject of contention in the suit) *under a through bill of lading*. That fact, of course, made the transportation joint to Social Circle, just as it was to Augusta and the case was consequently one in which the railroads had by their own conduct actually created a joint line to Social Circle, as well as to Augusta. No question was presented in this Social Circle suit whether the companies could have been required to make a joint line to Social Circle, if they had not actually done it by transporting under a through bill of lading; and that point could only have arisen if the companies had refused to carry upon joint through bill of lading.

(2.) The establishment of a joint line by railroads is

purely voluntary. It has often been ruled by this court and by other courts that a railroad cannot be compelled to carry beyond its own road.

A., T. & S. F. R. R. Co. v. *D. & N. O. R. R. Co.*, 110 U. S., 667.

Kentucky & I. Bridge Co. v. *L. & N. Ry. Co.*, 37 Fed. Rep., 567.

Little Rock & Memphis Ry. Co. v. *St. Louis, Iron Mountain & Southern Ry. Co.*, 41 Fed. Rep., 559.

Hutchinson on Carriers, § 145. (2d Ed.)

This being so, how can it result from a railroad's voluntarily carrying to a particular place beyond its own road that it must carry involuntarily to other places beyond its own road. And if to any other places, why not to all other places? There is nothing in the common law to require a railroad to carry freight beyond its own line to any places except where it may voluntarily; and no provision of the Interstate Commerce Act can be found to make any such requirement. In requiring rates to be reasonable, in forbidding discriminations, in its long and short haul clause, and in its provision for publication of rates, the act does not require a railroad to carry to any place, or to make rates to any place, to which it is not compelled by the common law to carry or to make rates. The rules of the Interstate Commerce Act are for testing the propriety of the amount of rates actually made, not for enlarging the business that a railroad must conduct beyond its charter and common law obligations.

(3.) Not only does the Interstate Commerce Law leave unaltered the entire voluntariness of a railroad's carriage and rate-making beyond its own line, as it is un-

der the common law, but the act affirmatively recognizes the freedom of a railroad to engage in such business beyond its own line, or not, as it will. The statute does not in any case compel the establishment of a joint line, or the making of a joint rate. In section 6 it provides for the filing of joint tariffs with the commisson "*in cases where* passengers and freight pass over continuous lines or routes operated by more than one common carrier and the several common carriers operating such lines or routes establish joint tariffs of rates or fares or charges for such continuous lines or routes." Indeed, it may be seriously questioned whether Congress, any more than the state legislature, could constitutionally compel a railroad to enter upon business beyond its chartered line; and certainly it is not readily to be considered that a railroad which voluntarily enters a joint line between certain places must likewise enter upon joint line arrangement between all places upon the same roads. Clear and indubitable warrant must appear for any such conclusion.

(4.) It is not to be forgotton that if two railroads forming a joint line between certain places can consequently be compelled to make a joint line between all intermediate places on their roads, they can equally be compelled to form a joint line between remoter places upon their roads. The right of a railroad to determine for itself whether or where it will carry beyond its own road is as much invaded in one case as in the other.

(5.) Suppose that one of two roads which have established a joint line between certain places refuse to extend the joint line to other places and make the necessary joint rates for those other places, though the other railroad be willing to do so, how can the latter compel the co-operation of the former and how shall the joint rates that must

be made for the new places to which the joint line is to be extended be determined for the two companies? The Interstate Commerce Commission has no power to do it, and the courts are not adapted to it.

(6.) It is submitted that the only true rule (and the rule as recognized by the common law, and not overthrown by the Interstate Commerce Act), is that a railroad need not carry beyond its own chartered road, unless it chooses; and that if it does voluntarily contract to carry beyond its own road to one place, that is no reason why it can be compelled to carry beyond its own road to another place where it has not voluntarily agreed to carry. While joint lines actually created are subject to the Interstate Commerce Act, and joint rates actually made must be tested by the provisions of that act, it rests in the option of railroads to make joint lines and joint rates, or not, just as has always been the case.

Under B,—

(1.) If plaintiff, however, were to demand a joint rate from Iowa to the seaboard because of the joint rate from Nebraska to the seaboard, his contention would have to be that if four companies make a joint line between certain places on the two most remote of the roads forming the joint line, then the third of the roads (being next to the last road) must make a joint line with the last road between all places on their two respective roads, and that, too, though the joint line originally established was neither to nor from any place upon the road of the third company. Such would have to be plaintiff's argument because the Elkhorn Company and the Sioux City and Pacific Company were parties to the Nebraska-Seaboard joint line and would not be to the Iowa-Seaboard joint line, and from the further fact that the Nebraska-Seaboard

joint line did not embrace any stations whatever upon the North-Western road.

The Elkhorn Company and the Sioux City and Pacific Company are not the same as the North-Western Company. The petition itself acknowledges them to be separate corporations, and simply avers that the North-Western Company "owned a *majority* of the stock, and by the same general officers and board of directors controlled and operated the Fremont, Elkhorn and Missouri Valley Railroad, and the Sioux City and Pacific Railroad, which roads connected with the Chicago and North-Western Railway at Missouri Valley and extended westward to points in the State of Nebraska." (Rec., 2.) One corporation of which another corporation owns, not all the stock, but merely a majority of the stock, certainly cannot be the same as the second corporation. The two are substantially, as well as formally, distinct. All the stockholders of one company are different from those of the other, and nearly half of the stockholders of the other company have no connection with the first company. This necessarily leads to different interests, different beneficiaries and separate standing before the law. Nor is the fact important (which the petition has been seen to aver) that the same persons are to a large extent officers of both corporations. Their official characters are none the less distinct. Their powers come from different sources, their duties are to different corporations and their different stockholders; and their legal characters are as separate as would be the case if the offices were held by different persons. The appeal which plaintiff makes to the first section of the Interstate Commerce Act also fails to make the three separate companies identical. The claim is that section 1 makes two or more

companies identical under the law when they are "under a common control, management or arrangement for a continuous carriage or shipment." The answers are three: In the first place, the quoted language from section 1 applies only to transportation partly by railroad and partly by water, and not at all to transportation wholly by railroad. The full sentence is: "That the provisions of this act shall apply to any common carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management or arrangement for a continuous carriage or shipment, from one state or territory of the United States or the District of Columbia to any other state or territory of the United States or the District of Columbia, etc." The words "under a common control, management or arrangement for a continuous carriage or shipment" have no connection with "in the transportation of passengers or property wholly by railroad." They connect, on the other hand, with the words "partly by railroad and partly by water when both are used," which they immediately follow. Otherwise, the words "when both are used" would be absurd and meaningless. Otherwise, too, the Interstate Commerce Act would not apply at all to transportation by railroad unless there was a common control, management or arrangement for a continuous carriage or shipment, and, therefore, would not apply to railroad transportation upon the line of a single company. Careful inspection of the language will make the construction, as here indicated, indubitable. In the second place, the facts that the North-Western owned a little more than half of the stock of the Elkhorn and Sioux City and Pacific Companies and that the same per-

sons were to a certain extent officers of both would not bring the three companies under "a common control, management or arrangement for a continuous carriage or shipment." In the third place, if the three companies were under a common control, management or arrangement for a continuous carriage or shipment, that could have no bearing upon the question immediately under discussion. The only result would be that the transportation actually performed under such common control, management or arrangement would be deemed a single transportation, and that could have nothing to do with the separateness of the three corporations or the right to require that they submit themselves to a common control, management or arrangement for a continuous carriage or shipment between places other than those between which they have *in fact* formed joint arrangements. It is clear, therefore, that the Elkhorn and Sioux City and Pacific and North-Western Companies must be deemed wholly separate companies in considering the question whether North-Western Company was bound to establish a joint line with the road east of Chicago to the seaboard from Iowa stations, because those two companies had established the Nebraska-Seaboard line jointly with the Elkhorn and Sioux City and Pacific Companies.

If, as hereinbefore argued, individual and joint rates are not to be compared for the purpose of testing their relative adjustment, still more will it be true that a part of several companies, who have formed a joint line between certain places, need not, in consequence of the establishment of such joint line, themselves extend the joint line to places upon their own roads not theretofore included in it. If a joint line and the individual line of one of its members are separate, so also are the

joint line and the combined line of any number (less than the whole) of the members of the joint line. If comparison of a joint rate with an individual rate of one company participating in the joint rate is improper, so also is comparison of the joint rate of the several companies with another joint rate of a portion only of those companies. Still more will it be improper that, because numerous companies have made a joint line between certain places, any two, three or other number of companies less than the whole number *be compelled* to form a joint line of their own between all other places upon their respective roads—even though the actually established joint line did not embrace any places upon the road of any of the companies whom it is sought thus to coerce into joint line arrangements.

5. It is not shown that plaintiff applied to defendant for a seaboard rate.

(1.) The only allegation of the petition to be considered in this connection is as follows:

"Plaintiff avers that said freight tariff of December 30, 1887] was never printed in type and was never circulated or published at any of the stations on defendant's road in the State of Iowa, and no copy thereof was ever filed with the interstate commerce commission as required by law, and the existence of the same was concealed from the knowledge of plaintiff and of shippers in the State of Iowa upon the line of defendant's road, and the benefits and advantages of the rates specified in such tariff were denied to plaintiff and shippers on the line of defendant's road in the State of Iowa." (Rec., 4.)

This does not mean that plaintiff applied to defendant for a seaboard rate upon the shipments in suit and was refused a proper seaboard rate upon those shipments; but is merely a general complaint, on the part of other ship-

pers in the State of Iowa just as much as plaintiff and in the same way, that the tariff of December 30, 1887, was not brought to the attention of Iowa shippers and made available to them by filing with the commission and regular publication at the stations on defendant's road in Iowa. There is nothing in the quoted language of the petition to show that plaintiff intended and attempted to ship the grain in suit to the seaboard and was refused that privilege except upon a rate (being the sum of the locals to and from Chicago) greater than the Nebraska-seaboard joint rate.

(2.) The alleged failure to file the joint tariff and to publish it at stations was unimportant.

In the first place, such failure, even if wrongful, would not give a right of action to everybody in Iowa who had shipped any grain anywhere out of the state during the period of the tariff's not being filed and published, but would be available as a basis of claim (at most) only to persons who had in consequence of the failure to file and publish the tariff been compelled to pay more for transportation of grain to the seaboard than they ought to have paid in view of the tariff. Consequently, plaintiff, who did not ship any grain to the seaboard and who did not even apply for a seaboard rate, is not in position to complain of the failure to file and publish the tariff.

In the second place, the filing of tariffs in the office of the commission at Washington is not as a means and for the purpose of communicating such tariffs to the shippers. It is the publication required by law that is for the benefit and direct protection of the shipping public; and no shipper can sue for the mere failure to file with the commission. When the requirements concerning general publicity of a tariff are met, no private action

for damages will lie because the commission is not provided with the tariff. Further, under this point, it must be noted that no pretense is made of plaintiff's having sought to find the tariff in the commission's office, and lost the benefit of it through its not being there filed.

In the third place, the Interstate Commerce Act neither does nor did at the time of the shipments in suit require the joint tariff of December 30, 1887, to be filed at the stations from which plaintiff made his shipments. The provision of the statute concerning publication of joint tariffs is and always has been as follows:

"Such joint rates, fares and charges on such continuous lines so filed as aforesaid *shall be made public* by such common carriers when directed by said commission, in so far as may in the judgment of the commission be deemed practicable; and said commission shall from time to time prescribe the measure of publicity which shall be given to such rates, fares and charges, or to such part of them as it may deem it practicable for such common carriers to publish, and the places in which they shall be published."

It is not shown in the petition that the commission ever made any requirement with reference to the publication of such joint tariffs as that of December 30, 1887. The burden of showing a violation of the law was, of course, upon the plaintiff; and it, therefore, rested with him to aver the existence and character of any order of the commission concerning publication, which defendant might be claimed to have disobeyed. If, however, judicial notice may be taken of such orders of the commission, it may be stated (without waiving the deficiency of the petition in not setting it forth) that the commission's order, made June 21, 1887, provided as follows:

"Such joint tariffs shall be so published by plainly printing the same in large type, at least the size of ordi-

nary pica, copies of which shall be kept for the use of the public in such places and in such form that they can be conveniently inspected at every depot or station on the lines of the carriers uniting in such joint tariffs *where any business is transacted in competition with the business of a carrier whose schedules are required by law to be made public as aforesaid.*"

Plaintiff's shipping points neither were nor are alleged by the petition to have been competing points of the kind indicated in this order; and, hence, no publication of the tariff was, in fact, requisite.

The allegations of the petition concerning defendant's alleged unlawful conduct in not giving the tariff of December 30, 1887, general publicity with Iowa shippers are consequently seen to come to naught.

(3.) If the petition had been intended to aver an unsuccessful application to defendant for a through seaboard rate upon plaintiff's shipments, it ought to have been made to appear to what seaboard place plaintiff sought to ship. No indication whatever is given on that point. The tariff of December 30, 1887, it will be remembered, was to Baltimore, Philadelphia, New York and Boston. To which of these points was it that plaintiff asked a rate and was refused the benefit of shipment upon terms as low as the Nebraska-seaboard tariff?

6. Even if plaintiff had been shown to have applied to defendant for a through seaboard rate, and to have been denied a rate as low as the Nebraska-seaboard rate, and even if the petition had charged those facts as a basis of recovery, instead of the alleged unlawfulness of the rates paid by plaintiff to Chicago, and even if defendant should be supposed to have unlawfully denied plaintiff the benefit of a joint seaboard rate not exceeding the Nebraska-

seaboard rate, yet plaintiff could not recover in this action because he actually made his shipments to Chicago, instead of shipping to the seaboard under protest upon such higher rate as defendant might have charged for such shipment, or shipping to the seaboard upon the best rate he could get on another road. Plaintiff is not in a position to complain of the seaboard rates after having, in fact, shipped to Chicago.

If a railroad demands more than a lawful rate from a shipper who wishes property transported to a given place, the shipper has a choice of three remedies. He may mandamus the railroad to carry for a proper charge; or he may pay the demanded charge under protest, have his goods transported, and sue to recover the excess above a lawful charge; or he may get his property transported *to the same place* by the cheapest means available, and sue the railroad for whatever amount he may have been compelled to pay for the transportation in excess of what the railroad should have charged him for the same transportation. The shipper cannot, on the other hand, abandon his purpose of having his property transported to the place where he sought to have the railroad carry it, and then turn around and sue the railroad because it demanded too much of him. In such case he has not been harmed by the unlawful demand. He has not paid any part of that charge, and he has not had to pay another for the same transportation more than the railroad to which he applied should have demanded of him. He has, instead, chosen voluntarily to send his goods to a different place from that where he asked the railroad to carry them, and in having them carried to such other place he has gotten a different transportation service presumably worth all he paid for it. His shipment to a

different place is not a necessary consequence of the high price asked of him for shipment to the destination first intended. He could still have shipped there and have recovered whatever it cost him more than was right. In chosing a new and different destination for his goods he makes a voluntary and independent change of plan, with the result of wholly avoiding the unlawful demands made upon him.

If plaintiff in this case could ship to Chicago and then sue defendant upon the theory that he made his shipment to Chicago because he had been asked to pay too much for transportation to the seaboard, he could equally have shipped his goods to New Orleans or San Francisco, or for that matter to Liverpool or Hong Kong, and brought the same suit against defendant upon the same sort of theory. The shipment actually made has no logical or legal connection with the unlawful charge supposed to have been asked for transportation to the seaboard. In shipping to Chicago, just as much as if he had shipped to Hong Kong, plaintiff abandoned his right to have his goods carried to the seaboard and hold defendant responsible for such extra cost of seaboard transportation as its refusal to make him a proper rate might render unavoidable. He chose, instead, a different market and sought and obtained a different railroad service, and has no more right to assail the charge he paid for that service than he would have had if he had never applied for any rate to any other place. The shipment actually made, being different from and having no connection with the shipment originally proposed, must stand solely upon its own merits.

It will not be forgotten that plaintiff not only shipped to Chicago, instead of shipping through to the seaboard

on the sum of the locals to and from Chicago, but he is not shown *ever* to have made a seaboard shipment, beyond Chicago. For ought that appears he disposed of his grain in Chicago. (Rec., 5, 9, 13, 17.) The only transportation charge he ever paid was, therefore, that upon the local shipment to Chicago.

SECOND POINT.

NO RIGHT OF RECOVERY IS SHOWN IN THE FIFTH (AND LAST) COUNT OF THE PETITION.

Most of the arguments upon the preceding counts will apply as well to the last count; but there must be indicated certain special differences.

I.

In this last count it is expressly alleged that the tariff made from Nebraska points was a joint tariff through to the seaboard; and its amount was from 33⅓ cents to 36⅔ cents, according to the particular destination on the seaboard. The argument in division I, concerning the first four counts, is therefore unnecessary here; but a new and controlling argument now arises through the fact that the seaboard rate directly alleged in the last acount of the petition was more than the local rate (19 cents) paid by plaintiff for his shipments from Carroll to Chicago, and the long and short haul clause is therefore altogether inapplicable.

II.

In this last count there is no allegation of the share in the total seaboard rate from Nebraska that was received by the defendant company, and consequently no question is presented under this count such as was answered in division II under the first point.

III.

All the arguments in the corresponding division (III) of the first point, with reference to the first four counts of the petition, are equally pertinent to the last count.

IV.

The answers made to the claim of a violation of section 3 of the Interstate Commerce act under the first four counts are applicable against any similar claim under the last count, except subdivisions 3 and 4, which were founded upon peculiar features of the former counts.

V.

All the arguments made under division V of the first point in reference to the question whether plaintiff has actually claimed, or could successfully claim, damages upon the theory that defendant ought to have made with the roads east of Chicago a joint rate to the seaboard from Iowa stations, are equally pertinent to any similar question under the last count, except subdivisions 2 and 3, which were founded upon peculiar features of the first four counts.

In addition to what was said upon the corresponding points in reference to the first four counts, the court's attention should be directed here to the pertinent parts of the last count in support of subdivisions 1 and 5.

The argument (under subdivision 1 of division V of the first point) that the petition, in fact, makes no such claim of damages for a refusal to establish a joint line from Iowa to the seaboard is supported by the following language in the last count (being exactly like that of the first four counts):

"Plaintiff avers that the *charges so made, demanded and received and collected as aforesaid* [*i. e.*, to Chicago], were unlawful, unreasonable and unjust, and contrary to the provisions of an act of Congress, entitled, 'An Act to regulate commerce'; approved February 4th, 1887, in that an unlawful preference and discrimination was practiced by defendant in favor of shippers of grain in the State of Nebraska and against this plaintiff, a shipper of grain in the State of Iowa, and in that defendant charged and demanded a greater compensation for a short than a longer haul in the same direction over the same line, the shorter being included in the longer haul and being for a like and contemporaneous service in the transportation of a like traffic under substantially similar circumstances." (Rec., 19.)

The language supporting the argument (made in subdivision 5 of division V of the first point) that the petition does not show an actual application by plaintiff to defendant for a seaboard rate is even stronger in the last count than in the preceding counts, and is as follows:

"That the said tariff only provided for and named points in Nebraska, and said tariff was not furnished to or made known to the agents of defendant at Iowa points, and was not filed with the Interstate Commerce Commission, and was not printed or published as required by said commission or by law, and the rate therein named was denied to shippers in Iowa points on defendant's

road. That the only rate on corn and oats made known during February, 1888, to shippers at Iowa points on defendant's road was a local rate to Chicago and a rate of 27½ cents from Chicago to New York, and a correspondingly high rate from Chicago to other seaboard points." (Rec., 18.)

This language shows beyond a doubt that defendant is charged only with a general failure to make its Nebraska seaboard tariff known and available to all Iowa shippers alike, and that there is no claim of application by plaintiff for a seaboard rate, or of denial of any such application.

Conclusion.

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

Lloyd W. Bowers,
Attorney for Defendant in Error.

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FILED.
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In the Supreme Court of the United States.

OCTOBER TERM, 1896.

E. M. PARSONS, PLAINTIFF IN ERROR,
v.
THE CHICAGO AND NORTHWESTERN Railway Company.
} No. 198.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF PRESENTED BY LEAVE OF COURT ON BEHALF OF THE INTERSTATE COMMERCE COMMISSION.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

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THE CHICAGO AND NORTHWESTERN RAILWAY COMPANY. } No. 198.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF PRESENTED BY LEAVE OF COURT ON BEHALF OF THE INTERSTATE COMMERCE COMMISSION.

One question argued in this case is of most vital importance in the administration of the interstate commerce act by the Commission appointed for that purpose. That question is: What is the meaning of the word "line" in the long and short haul clause? As the question is involved in so many controversies pending, the Interstate Commerce Commission have requested me to present its views thereon. The long and short haul clause is as follows:

> That it shall be unlawful for any common carrier subject to the provisions of this act to charge or

> receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same *line*, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: *Provided, however*, That upon application to the Commission appointed under the provisions of this act such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act.

The question will be argued as it arises upon the last count of the petition herein. (Record, pp. 17–19.) It appears from the allegations of this count that on February 17, 1888, the defendant in error, in connection with certain other railroads, put in force a through rate of 36½ cents per 100 pounds upon corn and oats transported from Blair, Nebr., *via* Chicago, to New York; that Carroll, Iowa, is a point on this line of tracks; that shippers at Carroll and other Iowa points were denied this low rate, and that they are obliged to ship to Chicago upon a local rate and reship from there to New York, so that the total rate per 100 pounds on corn and oats from Carroll to New York *via* Chicago is 46½ cents. Blair and Carroll appear to be but types of the other

Nebraska and Iowa towns, respectively, upon the same line of tracks. In other words, Nebraska towns were given a New York rate, which was 10 cents per hundredweight, or 21 per cent, less than the rate given to Iowa towns for transportation over a much shorter distance, upon the same line, the shorter being included within the longer distance.

Plaintiff insists that the word "line" in the long and short haul clause means the physical line of tracks.

Defendant insists that it means a mere business arrangement, and that any intermediate points on a through line made up of various connecting roads may be deprived of the benefits of the long and short haul clause merely by denying them the convenience of through bills of lading or similar documents.

ARGUMENT.

The contention of the defendant in error as to the definition of the word "line" is based on a *dictum* in *Chicago and Northwestern Railway Co.* v. *Osborne* (10 U. S. App., 430). That case was decided October 17, 1892. The Interstate Commerce Commission (then composed of Commissioners Morrison, Veazey, Knapp, McDill, and Clements) commented at length upon it in their sixth annual report, rendered to Congress December 1, 1892 (pp. 31–35), and also in its decision in *Daniels* v. *C., R. I. and P. Ry. Co.* (6 I. C. C. Rep., 474–476). These comments are printed as an appendix hereto. Before discussing the main question I desire to say a few words about the railway company's contention that the decision must be accepted because it has so long been acquiesced in.

The plaintiff in that case made a prompt application to this court for a writ of *certiorari*, which was denied December 5, 1892 (146 U. S., 354). It seems clear from the cases cited by this court that the denial was based upon the fact that the judgment of the circuit court of appeals was not final. The action was one for damages. The jury had found for the plaintiff. The circuit court of appeals had therefore reversed the judgment and remanded the case for further proceedings—in other words, for a new trial. Instead of bringing the Osborne case up again, counsel amended his petition in this case on December 28 (Record, p. 23) and substituted it as the test case upon the question involved. It seems to have been pushed with due diligence, so that in view of its pendency and of the position promptly taken by the Interstate Commerce Commission neither this nor any other railroad can have had any reason for assuming that the meaning of the law was settled.

It is, however, contended by the learned counsel for the railroad company that Congress, by failing to legislate in accordance with the request of the Interstate Commerce Commission, has indicated its approval of the Osborne opinion, and that this approval must receive full effect notwithstanding the ruling of this court in the Social Circle case, 162 U. S., 184, which to some extent at least conflicts with it. It is true that Congress, while annually grappling with bills amendatory of the interstate commerce act, has not as yet succeeded in passing one. The difficult questions raised by these bills, particularly with relation to the anti-pooling clause of the act,

have effectually blocked all action thereon. Remedial legislation has been difficult upon all subjects, in view of the pressure of questions relating to the currency and the revenues, together with the responsibilities of Congress in administering the affairs of neighboring nations. The learned counsel seems somewhat to underestimate the presumed rate of speed with which Congress reaches the final settlement of domestic questions. We may instance the case of *Robertson* v. *Hedden*, 40 Fed. Rep., 322, decided against the Government October 24, 1889, and reversed by this court February 5, 1894 (151 U. S., 520). The circuit court decision had been often followed by the courts and appraisers during the intervening time, and Congress remained inactive. Its inactivity, however, did not indicate acquiescence, for it finally spoke; and when it spoke it disapproved the circuit court decision—nearly seven months, however, after that decision had been finally overthrown. (Tariff act of August 28, 1894, paragraph 257.)

The merits of the question are therefore still open for discussion.

What is a "line?"

In the absence of any testimony showing a usage to the contrary, the word is to be construed as used in the vernacular—*ut loquitur vulgus*. (Maxwell on Statutes, 2d ed., p. 69, citing Dr. Lushington in *The Fusilier*, 3 Moore, P. C. C. N. S., 51, 58; *Maillard* v. *Lawrence*, 16 How., 250, 251; *Saltonstall* v. *Wiebusch*, 156 U. S., 601, 602; 1 Kent's Commentaries, 462; Endlich on Interpretation of Statutes, §§ 2, 76, 78; Potter's Dwarris

on Statutes, p. 143; Vattel, quoted in Sedgwick, Construction of Statutory Law, 2d ed., p. 231; *School Directors* v. *Bank*, 8 Watts, 289, 291.)

A vernacular usage of the word "line," as applied to all-rail or part-rail-part-water routes, has long been familiar. In relation to all-rail routes, it means an actual line of continuous track from one place to another, irrespective of the ownership of the track, whether united in one corporation or divided among many. In relation to part-rail-part-water routes it means the combination of such a line with a direct water route traversed by steamers in connection therewith. It may be sufficient to instance the many "lines" between New York and Boston, such as the Air Line, Shore Line, and Fall River Line, and the Vandalia Line between Indianapolis and St. Louis. Even when the name of a corporation is used, it is merely as a convenience. Thus it is common to speak of the "Union Pacific Line" from Omaha to San Francisco.

Probably no statutory provisions have ever been drawn with greater care than the second, third, and fourth sections of the interstate commerce law. The word "line," if construed in accordance with the popular usage above referred to, makes the long and short haul clause perfectly simple and clear. Whatever physical line of tracks may be selected to serve as the long-distance unit, no greater charge can be made for transportation over any portion of it than is made for transportation in the same direction over the whole of it (the circumstances and conditions being substantially similar) except in

special cases by leave of the Interstate Commerce Commission.

Counsel supposes that because the word "railroad" is used in one section and the word "line" in another there is a presumption that Congress meant by each word the same thing. No authority is cited for this presumption.

We are unable to appreciate the difficulty found by counsel in the phrase "the shorter being included within the longer distance." Take, for instance, the "Royal Blue Line" from Washington to New York, formed by the Baltimore and Ohio, the Reading, and the Central of New Jersey. The charge from Washington to Philadelphia can not be greater than the charge from Washington to New York, because the shorter is included within the longer distance; but the charge from Wilmington to Trenton may be greater than the charge from Washington to Philadelphia, because the shorter is not included within the longer distance.

The use of the word in the sixth section confirms the view that it refers to a physical line of tracks.

Counsel complains that a natural construction of the long and short haul clause will be arbitrary and oppressive, because it will force railroad companies to unite when they do not wish to unite. This is a misapprehension. No railroad companies are forced to unite their lines, but the law says to them: "If you desire to unite in forming a line for one purpose, you must treat it as a line for all the purposes of the fourth section. You may form a line from Carroll, Iowa, to New York without giving its benefits to Blair, Nebraska; but if you form

a line from Blair, Nebraska, to New York *via* Carroll, Iowa, you must recognize the fact that Carroll is on the line, and charge no higher rate from Blair to Carroll or from Carroll to New York than you do for the whole distance from Blair to New York. So long, however, as you do not charge more for the shorter distance than for the longer distance which includes it, the fourth section altogether refrains from interfering with your rates."

We understand this to be in substance the rule of the Social Circle case. The able counsel for the railroad company attempts to base a distinction upon forms of bills of lading. In that case three railroads had united to form a through line from Cincinnati *via* Chattanooga, Atlanta, and Social Circle to Augusta. This court held that Social Circle, being on the line, must be given the benefits of the long and short haul clause. It referred, however, to the fact that through bills of lading were granted from Cincinnati to Social Circle. Would the result be any different if Social Circle had been denied through bills of lading and the goods had been billed from Cincinnati to Atlanta only, there to be unloaded and reshipped?

It may be noted, in the first place, that no such distinction is tenable under the pleadings in the case at bar. Assume that the denial of through bills of lading from Carroll to New York takes Carroll out of the protection of the fourth section of the statute. But what right has the Chicago and Northwestern Railway Company to deny the privilege of through bills of lading to the Iowa points on its own tracks while permitting them to Nebraska stations which are beyond its own tracks, but on

those of railroad companies which it controls? No reason is apparent for this preference of Nebraska shippers over those of Iowa. Even did the Northwestern not control the Nebraska roads, their freights pass over its rails, and could not be through-rated without its consent. The petition therefore raises a question of undue preference within the third section of the statute, and questions under the third section are universally admitted to be questions of fact, not soluble upon a demurrer.

Assuming, however, that the third section is not applicable as between Carroll and Blair, is there any substantial dissimilarity of circumstances and conditions constituted by the form of the bill of lading between corn shipped from Blair to New York and corn shipped from Carroll to Chicago for immediate forwarding to New York? There is no difference in the corn. There is no difference, so far as appears, between the situation at Blair and the situation at Carroll. From Carroll to New York the corn must go over the same tracks and in similar cars drawn by similar engines. The granting of a through bill of lading from Blair is but a convenience to shipper and carrier alike. It is the duty of the carrier to forward corn as rapidly as possible from all localities; and even if rebilled or nominally reshipped at Chicago, the Carroll corn, if shipped in carload lots, would pass unmolested through Chicago, just like the Blair corn. The denial of through rates to Carroll could have no reason except its handiness as an excuse for evading the fourth section of the interstate commerce act, and granting an undue advantage to Blair. It would be against the spirit, if not the letter, of the seventh section, not

being "made in good faith for some necessary purpose," but "to evade [one] of the provisions of this act." The dissimilarity is not substantial, but artificial and illusory.

The learned counsel for the railroad company appealed to the sympathy of the court upon the oral argument of this case by stepping outside of the record and showing that the through rate from Blair to New York was granted in order to compete with an opposition rate given by a combination of railroads forming a circuitous line between those points *via* St. Louis.

This excuse is unavailable for two reasons.

The long and short haul clause is just as applicable to the circuitous route *via* St. Louis as to the direct route *via* Chicago. If applied, the circuitous route will quickly slacken its competition or it will be obliged to grant the same rates to all intermediate points between St. Louis and Blair. The statute will operate much more severely against it than it does against the railroads forming the direct line. It may, indeed, be claimed that the through rates will not always at once be known to the Interstate Commerce Commission and to the public; but if not known, it will be because of omissions which constitute criminal offenses under the sixth section of the interstate commerce act. The remedy is with the courts, in enforcing the provisions of that section.

If, on the other hand, the situation is such that the long and short haul clause is inapplicable to the competing line—as, for instance, if it is a water route allowing effective competition, or one otherwise not subject to the interstate commerce act—then we have one of the

"special cases" covered by the proviso to the fourth section. In such cases the Interstate Commerce Commission is liberal in the use of its dispensing power.

It is possible, however, that the learned counsel may be misinformed as to the real causes of a discrimination which occurred so long ago and which, owing to the inevitable delays of litigation, has come so late to the attention of this court. Suppose that, as intimated by the plaintiff, the Nebraska points were preferred because of relations between Nebraska shippers and railroad officials. Such a case is neither unprecedented nor even uncommon. Or suppose that the officials of a combination of railroads had come to the conclusion that the roads could make more money by dividing the agricultural districts into zones, so that those in the longitude of Iowa should supply the Central West at high local rates, while those in the longitude of Nebraska should supply the East and Europe at comparatively low through rates. In that case also the advantage to the carrier would be no excuse for the restriction of competition. It is submitted that the railroad company has shown no reason for overriding the long and short haul clause with judicial legislation, or construing it otherwise than according to its plain language.

Both parties conceded on the oral argument of this case that the Congressional debates are incompetent. This is indisputable. (*Aldridge* v. *Williams*, 3 How., 9, 24; *United States* v. *Union Pacific Ry. Co.*, 91 U. S., 72; *District of Columbia* v. *Washington Market Co.*, 108 U. S., 243, 254; S. C., 3 McArth., at p. 571; *Mitchell* v. *Great*

Works Milling Co., 2 Story, at p. 653; *County of Cumberland* v. *Boyd*, 113 Pa. St., at p. 57; *Leese* v. *Clarke*, 20 Cal., 387, 425.) I therefore do not allude to them.

I do not understand the problems propounded with relation to the Northwestern and Union Pacific Companies sufficiently well to discuss them. The officers of the one company will not be held responsible for misdeeds of the other as to which they are ignorant.

Nor do I discuss the oft-mooted question whether directors can serve the public better without Government supervision than with it, because that is a question legislative and not judicial in its nature. An affirmative answer might be conceded if directors always sought to protect the interests of stockholders and bondholders rather than their own, and if they always sought success in the long run rather than immediate dividends. Congress has failed to trust them, and has undertaken instead the experiment of governmental supervision, an experiment very conservative in its methods and well worthy of a fair trial. The experiment has failed as yet of a fair trial, and its wisdom therefore still remains untested, because of decisions and *dicta* in the lower courts which seem to be based upon very strained methods of interpretation and to disregard not only the history and objects, but even the wording of the statute.

In conclusion, I may quote the ingenuous concession of counsel for the railroad company at p. 31 of his brief: "As the long and short haul clause *did pass with the rest*, it cannot be denied such force as may clearly belong to it." No authority is cited which requires it to be con-

strued like a penal statute. It is remedial and should be construed according to its intent. (Compare *Wiborg* v. *United States*, 163 U. S., 632, 647; *United States* v. *Stowell*, 133 U. S., 1, 12.)

Respectfully submitted.

EDWARD B. WHITNEY,
Assistant Attorney General.

APPENDIX.

[Extract from Sixth Annual Report of Interstate Commerce Commission, 1892, pp. 31–35.]

The circuit court of appeals for the eighth circuit, sitting at St. Paul, in October last, made its decision on the appeal of the Chicago and Northwestern Railway Company from a judgment of the United States circuit court, southern district of Iowa, rendered upon the verdict of a jury in favor of John Osborne for the sum of $225, as overcharges on corn shipped by Osborne from Scranton, Iowa, to Chicago. The decision of the appellate court reverses the judgment of the court below upon a statement of facts in the opinion which shows that the rate from Scranton to Chicago was a local rate on the Northwestern road, and that the lower rate for the longer distance from Blair, Nebr., to Chicago, with which the Scranton rate had been compared in the trial court, was not a rate to Chicago, but part of an agreed through rate from Blair to New York and other eastern points over the Fremont, Elkhorn and Missouri Valley Railway, the Chicago and Northwestern Railway, and lines running east from Chicago. Therefore, the aggregate charge for the longer distance, Blair to New York, was not less than the charge for the shorter distance, Scranton to Chicago, and upon such facts Osborne had no case. The courts and the Commission have uniformly held that a carrier's share of a joint through rate is not the standard by which to measure its local or individual rates, and therefore, upon the facts stated, the decision is in accord with previous rulings on the same general question.

But the opinion of the appellate court contains the further doctrine that the joint line formed by two roads

is wholly independent of the two lines represented by the respective roads; that the total joint rate is not the standard by which the reasonableness of rates over the individual lines can properly be measured, and therefore that the total joint rate over two roads not being over "the same line" might, for anything in the fourth section of the act, not only be as low, but even lower than the local rate of either. This latter part of the opinion, not being necessary to the decision, can not be regarded as more than dictum. The meaning of the word "line" in the fourth section, as construed by the Commission in its decisions in the "Central Vermont cases" (1 I. C. C. Rep., 158), and generally accepted by carriers throughout the country, is that "a physical line is meant, not a business arrangement, and one piece of road may be a part of many lines."

The very word itself conveys to the mind an idea of something physical. One road is a line, two connecting roads are also a line, and the former by the action of its owner becomes a part of the latter. Literally speaking, a carrier can not make its line. It had to invoke the power of the State to authorize it to build a railroad and become a common carrier over that road, and its existence as an operating common carrier depended upon its construction of the line over which it must operate. So, also, when the convenience of transportation interests requires the tracks of one carrier to be joined to those of another, the carriers must first be authorized under some provision in their charters, or some general or special law, to make the junction, and then a line composed of two roads is thereby formed over which traffic originating on one road may go without break of bulk, loading in different cars, or any rehandling of the traffic whatever. And in 1866, in order to remove and in future prevent trammels upon transportation between different States, either by State legislation or existing Federal

law, Congress found it necessary to pass a general law authorizing every carrier by steam railroad to engage in interstate commerce, and to *connect* with roads of other States *so as to form continuous lines.* (Sec. 5258, Revised Statutes.) Here physical connection for the purpose of a continuous line is plainly meant (Council Bluffs *v.* Kansas City Railway Company, 45 Iowa, 338), and in framing the fourth section of the act to regulate commerce Congress must be presumed to have had the law of 1866 in mind, and to have used the word "line" in the same sense in a statute to regulate the carriage of interstate commerce as it did in a prior statute authorizing such commerce to be carried.

In this connection we call attention to the plain language employed by Senator Aldrich in the debate over the meaning of the word "line:"

"The word 'line' as used in the fourth section can have but one meaning, and that is the physical structure, the track over which property is transported.

"To transform this mass of rails, ties, and sidings, over which freight is hauled, into a living, responsible being, which can make contracts and be subjected to penalties, is beyond the power of human effort." (Debates on Interstate Commerce, Forty-ninth Congress, second session.)

A business arrangement between the carriers is a wholly different matter. They can use and discontinue using the through line at will. They can make through rates or charge the sum of locals, and can carry under through bills between points on their respective roads or assert their right to rebill and carry as a separate shipment. But all traffic carried over the joint line, or any part of it, is subject to the prohibition of the fourth section against charging more for the transportation of passengers or of like kind of property for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance.

That the word "line" refers to the physical route over which the transportation is conducted and not to a business arrangement is obvious from the context of the section. Transportation "over the same line" clearly means one continuous line over which the carriage takes place—not a parallel line, not a branch line, but such a line as includes the shorter within the longer distance. Shorter and longer distances just as plainly relate, not to agreements between carriers, but solely to the length of haul *over* the continuous route, and the words "in the same direction" were inserted to exclude consideration of shorter and longer distance shipments in contrary directions. All this has no reference to traffic contracts and rate agreements. No one will contend that the fourth section of the law was intended to apply only in spots, yet the effect of the independent-line doctrine is to make separate application of the rule to individual and joint lines and make charges unlawful which are greater for shorter than for longer distances over a single railroad, but at the same time to sanction such short-haul charges when they are greater than rates over both the connecting roads. Considering that cost of carriage must ordinarily increase somewhat with distance, such a theory appears paradoxical. A rate from Chicago to Buffalo greater over one road than the rate on like traffic from Chicago to New York over two connecting roads is clearly indefensible if a rate from Chicago to Cleveland greater than the rate from Chicago to Buffalo, both over one road, is unlawful.

There is nothing in the debates in Congress before the law was passed which sustains the view that the joint line is independent of a constituent line in any other sense than the authority to make joint rates lower than the sum of rates in force over the respective roads. This very authority was the cause of the discussion in regard to joint and individual lines. It was definitely stated in

debate that a through rate from San Francisco to New York over four roads, each charging $100 per car between its termini, need not for that reason be $400, but such through rate might even be as low as $100 for anything in the fourth section. And the authority thus given to the joint line is no more than that possessed by the individual road, namely, the right to charge rates which are not the sum of rates from station to station. So long as the aggregate shorter distance charge is not more than the aggregate longer distance charge the fourth section is not violated, and distance proportions of individual rates or road divisions of through rates have nothing to do with the case.

The idea that the total joint rate is not a standard of comparison on the question of reasonableness of an intermediate rate confined to one of the roads in the joint line is open to the same objection, and, of course, falls if the independent-line theory fails. This denial of the right of comparison should be limited to divisions of the joint rate between the carriers. Extend it to total rates and one of the main elements which must be considered in determining the relative reasonableness of rates will be excluded. The act does not directly regulate proportionate or divided charges, but it does prohibit total or aggregate charges which are unreasonable or constitute unjust discrimination or undue preference.

The disastrous effect of a construction of the law which would make the application of any of its provisions depend upon rate agreements between carriers is apparent. Unjust discriminations and undue preferences would be justified on the ground of independent lines under independent control, and small places would be thrust back into subserviency to the less favorably situated large towns on the same physical line. The great volume of traffic to the sea would, as it did before the law took effect, induce joint lines to carry to the seaboard

for less than some of the carriers in the joint arrangement charge for carrying to an intermediate point, and inland centers of distribution would suffer under abuses as abhorrent as those which the law under accepted construction has abolished. Carriers owning long individual lines would be at great disadvantage in the competition for traffic with joint lines, for the former must obey the long and short haul rule throughout the length of their lines, while on joint lines the prohibition would cease and begin as the terminus of each constituent road should be reached.

This doctrine of independent lines has been treated at some length because of its apparently having been reached by misapprehension of the scope of rulings by the Commission on the same subject, as appears by the following language in the opinion: "And also worthy of note, that in the actual administration of affairs by the Interstate Commerce Commission the same thing has been constantly recognized."

[Extract from decision of the Interstate Commerce Commission in Daniels *v.* Chicago, Rock Island and Pacific Railway Co. et al., Nov. 16, 1895, 6 I. C. C. Rep., 474-476.]

The defendants suggest in their answers and distinctly raise in their brief an important question of law founded on the decisions of the eighth circuit court of appeals in the cases of *Chicago and N. W. R. Co.* v. *Osborne*, 4 Inters. Com. Rep., 257; 52 Fed. Rep., 912, and *Tozer* v. *United States*, 4 Inters. Com. Rep., 245; 52 Fed. Rep., 917. It is contended on behalf of the original defendants in the case relating to rates from Chicago, that while the Rock Island, Cedar Rapids, and Sioux City and Northern roads make rates to Sioux City, only two of them—the Rock Island and the Cedar Rapids—make rates to Sioux Falls; that two separate and independent lines are thereby formed, viz, one from Chicago to Sioux City, the

other from Chicago to Sioux Falls; and that rates over these independent lines can not be compared in a case where the lawfulness of either rate is questioned. A similar situation exists in the carriage from Duluth. The Great Northern carries over the whole distance from Duluth to Sioux Falls, while traffic from Duluth to Sioux City is carried by that road in connection with the Sioux City and Northern.

The cases above mentioned apparently hold that the rate of an individual road can not properly be compared with a rate jointly made by that road and another connecting carrier. The facts in those cases, however, as they are disclosed in the reported opinions, did not require the affirmance of this proposition in order to sustain the conclusions therein reached, since in each of them a local or individual rate of one road was, so it is stated, *sought to be compared with the division received by that road out of a joint or through charge.* The court held that this comparison was improper, and in doing so followed the rule laid down by the United States Supreme Court in the case of *Union Pac. R.Co.* v. *United States*, 117 U. S., 355, 29 L. ed., 920. But the court of appeals went further, *and held that individual and aggregate joint rates apply over separate lines and cannot be compared.* It is quite probable that the attention of the court was not called to the difference between using, as the basis of comparison, a division or share of a joint rate—which may be erroneous—and using for such basis a total or aggregate joint charge, which seems clearly legitimate, if not indispensable, to the proper adjustment of relative rates between different localities. We are disposed to regard this apparently inadvertent expansion of an adjudged principle into an untenable theory as dictum only, and feel convinced that the court itself will recognize the distinction at the first suitable opportunity. The "separate line" doctrine upon which the defendants rely has,

moreover, recently been the subject of consideration by an appellate court of equal authority—the circuit court of appeals for the fifth judicial circuit—where the decision of the court below, which had this separate-line theory for one of its main foundations, was reversed and the case remanded with instructions to grant the relief which the trial court had denied. (*Interstate Commerce Com.* v. *Cincinnati, N. O. & T. P. R. Co.*, 4 Inters. Com. Rep., 582.) In the act of June 15, 1866, Congress used the word "line" in the sense of a physical structure; and the word is also defined to mean a "physical line" in the debates in Congress when the fourth section of the interstate commerce act was under discussion. Under the fourth section of that law, two or more connected roads may charge rates which aggregate less than the sum of the local rates of the constituent roads, but not less than either of such locals; and this accords with the principle on which an individual road makes rates to its different stations—rates for a given distance, while not less as a whole than any intermediate rate, not being ordinarily the sum of rates in force between intermediate stations. (*Martin* v. *Chicago, B. & Q. R. Co.*, 2 Inters. Com. Rep., 32; 2 I. C. C. Rep., 25.) The word "line" in the fourth section of the statute was early construed by the Commission to mean "a physical line, not a mere business arrangement." (*Boston & A. R. Co.* v. *Boston & L. R. Co.*, 1 Inters. Com. Rep., 571; 1 I. C. C. Rep., 158.)

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1896.

No. 198.

E. M. PARSONS,

Plaintiff in Error,

vs.

CHICAGO & NORTH-WESTERN RAILWAY COMPANY,

Defendant in Error.

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

Reply of Defendant in Error to Brief Presented by the Interstate Commerce Commission.

LLOYD W. BOWERS,

ATTORNEY FOR DEFENDANT IN ERROR.

THE GUNTHORP-WARREN PRINTING COMPANY, 63 DEARBORN ST., CHICAGO.

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Reply of Defendant in Error to Brief Presented by the Interstate Commerce Commission.

Very little need be said in answer to the brief submitted on behalf of the Interstate Commerce Commission after the completion of the oral argument of the case and its submission to this court, beyond asking the court's consideration of the various parts of defendant in error's original brief in their proper connection with the Commission's brief. There seems to be nothing new in the latter. It may, however, serve the court's convenience to make the following very short comments, with references to the original brief of defendant in error.

I.

THE ACTUAL AND NECESSARY NATURE OF PLAINTIFF'S CLAIM.

The Commission would seem to have no proper interest in any question but the abstract inquiry whether a joint rate of two or more companies and an individual rate of one of those companies are comparable under the third and fourth sections of the Interstate Commerce Act. About the concrete question whether plaintiff has shown in his petition an actual right of recovery of damages the Commission apparently should have no concern; but its brief attempts to state on what theory plaintiff seeks damages and declares that his theory is, in the last count of the petition (though it is not pretended to be so in the preceding counts), that plaintiff was denied a rate from Iowa to the seaboard not exceeding the rate from Nebraska to the seaboard. Any such contention was answered in division V of the first point of my original brief (pp. 53–67 thereof) and in division V of the second point of the same original brief (pp. 69–71 thereof). I will here only enumerate the heads of argument, as follows:

(*a.*) The petition actually states plaintiff's complaint to be that the *rates paid by him for transportation to Chicago* were too large, and makes no showing for damages upon the theory of having been compelled to pay too much to the seaboard. (Original brief, pp. 53, 54, 70.)

(*b.*) Plaintiff is not shown to have applied to defendant for any seaboard rate. (Original brief, 62–65.) In the last count, it will be specially remembered, the allegation is clearly general, and recognizes that plaintiff was

not deprived of a rate as good as the Nebraska-seabord rate except in the same manner as Iowa shippers generally were, through the Nebraska-seaboard tariff not being extended to any other state than Nebraska. (See petition, quoted in original brief, 70, 71.)

(*c.*) There is no pretense of any showing *to what seaboard destination, if any*, plaintiff asked a rate, or was denied a rate. There is nothing to show whether, if he wanted to ship to the seaboard at all, he wished or asked to ship to Baltimore, Philadelphia, New York or Boston (to all of which places the Nebraska-seaboard rate applied and to which the rate was different), or to some other point. This is conclusive against the claim that plaintiff requested and was refused a rate to some seaboard point. (Original brief, p. 65.)

(*d.*) Finally and insuperably, *plaintiff in fact made all his shipments to Chicago, and is not shown to have ever shipped a bushel to any seaboard point*, either by through shipment from Iowa or by a second shipment from Chicago to the seaboard. This point, it is submitted, is absolutely conclusive against the right of plaintiff in any view to complain of the cost of transportation to the seaboard from Iowa. He never suffered through that cost, for he never paid any of it. As indicated in the original brief, if plaintiff wished to complain of the Iowa-seaboard rates, his remedy was a choice of three; either (1) to mandamus the company to carry for a proper rate, or (2) to pay the demanded rate under protest and sue for the excess beyond what was proper, or (3) to get his property transported to the seaboard over another route and sue defendant for the difference between the actual cost of such transportation and what defendant ought to have carried to the seaboard for. Plaintiff cannot complain of

the cost of transportation from Iowa to the seaboard when he chose to ship elsewhere and not to the seaboard; and he can no more complain of the seaboard rate from Iowa, when he never shipped to the seaboard, than he could so complain if he had chosen to send his stuff to New Orleans, San Francisco, Liverpool or Hong Kong, or any other market that he might decide to take the benefit of. I earnestly request the court's attention again to this point. (See original brief, pp. 65-68.)

II.

THE MERITS OF THE QUESTION WHETHER A RAILROAD CARRIER CAN BE COMPELLED TO CARRY BEYOND ITS OWN CHARTERED ROAD TO ANY OTHER PLACES THAN THOSE TO WHICH IT MAY VOLUNTARILY CONTRACT TO CARRY.

Nothing is said on this fundamental point in the Commission's brief. I again submit that neither in the common law nor in the Interstate Commerce Act can any rule be found that requires a carrier to carry freight beyond its chartered road, except where it will and as it may voluntarily agree to do so. When a railroad does voluntarily carry beyond its own road, the rates for such carriage are subject to review under the Interstate Commerce Law, as they were also under the common law with reference to their reasonableness; but there is nothing now, any more than there was before 1887, to compel a chartered railroad to do a carrying business anywhere beyond its own chartered road. This point is fully treated, with citation of authorities, in the original brief (pp. 55, 62).

III.

THE SOCIAL CIRCLE CASE.

It was sufficiently urged in my original brief, and also on the oral argument, that the fundamental fact on which the Social Circle case turned was that the same three railroads which carried from Cincinnati to Augusta did, in fact, voluntarily carry to Social Circle, as to Augusta, under a single through contract of carriage. On any view, therefore, the carriage from Cincinnati to Social Circle was over the same line as from Cincinnati to Augusta, for the carriage in both cases was over the same three roads and under joint contract of the same three companies. Further, the question was not involved in the Social Circle case whether the Georgia Railway (being the last of the three roads, and itself wholly situated within the limits of Georgia) could have been compelled to make a joint contract of carriage with the other two roads from Cincinnati to Social Circle, if it had not voluntarily done so.

Counsel for the Commission asks: "Would the result be any different (*i. e.*, in the Social Circle case) if Social Circle had been denied through bills of lading and the goods had been billed from Cincinnati to Atlanta only, there to be unloaded and reshipped?" Counsel's question admits only the prompt answer, "Yes, wholly different." In such case the difficulty would at once have been met that all that could be involuntarily required of the Georgia Railway was the performance of its charter duty to carry passengers and freight on its own chartered road, and it would have been wholly competent for the Georgia Railway to say that it would take the freight at its own

initial station, Atlanta, and carry it over its own road to Social Circle, but that it would only carry over that distance on its own road and would not make a through contract with the other two roads whereby it would become a party to the carriage all the way from Cincinnati. Further, as the Georgia Railway was wholly within the State of Georgia it would not have been subject to the jurisdiction of the Interstate Commerce Commission at all, unless it had in fact made itself a party to a through contract of carriage from Cincinnati to Social Circle, for if the Georgia Railway had limited its own contract and its own carriage to its own road between Atlanta and Social Circle its contract and carriage would have been entirely within the limits of one state. This point was clearly in the mind of the court, as is evidenced by the statement of Mr. Justice SHIRAS in the court's opinion, as follows:

"It may be that if, in the present case, the goods of the James and Mayer Buggy Company had reached Atlanta, and there and then, for the first time, and independently of any existing arrangement with the railroad companies that had transported them thither, the Georgia Railroad Company was asked to transport them, whether to Augusta or Social Circle, that company could undertake such transportation free from the control of any supervision except that of the State of Georgia. But when the Georgia Railroad Company enters into the carriage of foreign freight, *by agreeing to receive the goods by virtue of foreign through bills of lading and to participate in through rates and charges*, it thereby becomes part of a continuous line, not made by a consolidation with the foreign companies, but made by an arrangement for the continuous carriage or shipment from one state to another, and thus becomes amenable to the Federal act in respect to such interstate commerce."

(Page 192 of the opinion in 162 U. S. Rep.)

IV.

THE WORDS "RAILROAD," AS DEFINED IN THE FIRST SECTION OF THE INTERSTATE COMMERCE ACT; "LINE," AS USED IN THE FOURTH SECTION; AND "ROUTE" AND "CONTINUOUS LINES OR ROUTES," AS USED IN THE SIXTH SECTION OF THE ACT.

(*a.*) The Commission advances no argument whatever against our contention that there is no reason or justification for making the word "line" in the fourth section broader than the word "railroad," as defined in the first section. If "line" is not broader than "railroad," the definition of the latter in the first section for all purposes of the act as applying only to road owned or operated by a single company shows beyond dispute that the road of a single company separately owned and operated by that company is not the same line as the several continuous roads of numerous companies owned and operated separately in the course of a through carriage. It is again submitted that there is no sufficient warrant anywhere for enlarging the scope of the long and short-haul provision (which was the unprecedented and experimental part of the act) by giving the word "line" in that section a meaning broader than can anywhere in the act be claimed for the word "railroad."

(*b.*) Attention was called in the original brief to the fact that the sixth section, in its earlier parts relating to the rates of individual companies, uses the word "route" as the plain synonym of the word "railroad." If so, why should "line," any more than "route," be supposed to mean more than the road owned or operated by the same company?

(*c.*) Counsel for the Commission says that "the use of the word (*i. e.* line) in the sixth section confirms the views that it refers to a physical line of tracks." Nothing more than this, however, is said and the proposition has the quality only of assertion. I ask the court's attention in this connection to my original brief, pages 28–30. The argument remains unanswered that when the act refers to joint lines it everywhere expressly designates them by such language as "joint line," or "continuous line" or "route," or "joint tariffs, rates or schedules." This practice enforces the point that when the joint character is not explicitly indicated, the words of the act refer solely to individual companies, roads and routes. The further argument remains unanswered that in the important respects governed by the sixth section a wholly different policy is established as to individual lines and joint lines.

V.

THE QUALIFICATION "OVER THE SAME LINE" CANNOT BE INTERPRETED SO AS TO MEAN NOTHING MORE THAN THE OTHER QUALIFICATION "THE SHORTER BEING INCLUDED WITHIN THE LONGER DISTANCE."

This point remains wholly unanswered by the Commission. Senator CULLOM said of this fourth section:

"The limitations placed upon the prohibition that is made are very significant and they must not be overlooked. They require that in determining the sum that may be charged for a shorter as compared with a longer distance, the comparison must be made—

1. Between shipments of 'like kind of property.'
2. 'Under substantially similar circumstances and conditions.'

3. 'Over the same line.'
4. 'In the same direction.'
5. When the shorter is 'included within the longer distance.'

When the act is to be applied in any given case to measure the charge that may be made for any distance as compared with a longer distance *all* these limitations must be taken into account and they must *all* apply to the case—*not three or four of them, but all of them.*''

(Cong. Rec., Jan. 10th, 1887, Vol. 18, pp. 486, 487.)

The contention of the Commission that "line" in the fourth section means only physical structure reduces to the argument that it means nothing whatever, for with such an interpretation it adds nothing to the requirement that the shorter distance must be included within the longer distance.

VI.

CLAIM OF UNDUE PREFERENCE UNDER THE THIRD SECTION.

(*a.*) The Commission's brief urges that the question of undue preference under the third section is one of fact, and is therefore "not soluble upon a demurrer." But the existence of such undue preference is not directly alleged as a fact. It is claimed merely to arise as an inference from the particular facts and circumstances set forth specifically in the petition. If it be true, therefore, that such question is one of fact, it follows that the petition is fatally defective for not having alleged directly and in terms that the rates paid by plaintiff constituted (as the statute says) "an undue or unreasonable preference or advantage" to Nebraska and an "undue or unrea-

sonable prejudice or disadvantage" to plaintiff. This very point was made in our original brief at the foot of page 51. It is numbered by a typographical error (5), but should have been numbered 5, without parentheses.

If the question of the existence of undue or unreasonable prejudice or disadvantage under section 3 is a question of fact, then it is an inference of fact whether or not from particular facts specifically stated undue or unreasonable prejudice or disadvantage follows. Inferences of fact, being disputable and not necessary like inferences of law, cannot support the petition. Only direct allegation of the ultimate facts on which a recovery must be founded can suffice; and evidential particulars will not do.

(*b.*) As already argued in the original brief, no facts are stated from which to infer a violation of the third section as a matter of law, unless the petition alleges facts showing a violation of the long and short-haul clause. (See pages 50–52 of original brief.)

(*c.*) I had supposed that the Commission was interested only in a correct interpretation of the long and short-haul clause, and was not solicitous about any private question between the parties to this suit. If undue or unreasonable prejudice or disadvantage under the third section is a question of fact, the Commission can hardly be interested in that question. The Commission's brief, however, with the zeal born of standing as to certain general questions upon the same side with plaintiff in this case, seems to claim that there was some undue or unreasonable prejudice against plaintiff under the third section because different total charges would have had to be paid on "corn shipped from Blair to New York and corn shipped from

Carroll to Chicago *for immediate forwarding to New York.*" When making this reply I have not a paged proof of the Commission's brief, and must, therefore, be excused for not referring to that brief by page. Here, again, the facts of the case are neglected, as the petition discloses them. The petition nowhere shows that any of the plaintiff's grain was shipped to Chicago for "immediate forwarding to New York"; but, on the contrary, the petition admits that *the grain never went beyond Chicago.* The claim, therefore, must be that the rates paid by plaintiff for transportation from Iowa to Chicago were an undue and unreasonable prejudice and disadvantage to plaintiff, as compared with the rates for transportation from Nebraska to the seaboard. None of the facts alleged in the petition show that, unless the long and short-haul clause was violated. In the next place, let me ask again where on the seaboard this grain of plaintiff's went from Chicago, if anywhere? The petition will not tell us.

VII.

SUGGESTIONS MADE BY PLAINTIFF AND HALF-HEARTEDLY ADOPTED BY THE COMMISSION THAT DEFENDANT HAD IMPROPER MOTIVES FOR THE TEMPORARY NEBRASKA-SEABOARD TARIFF OF 1887.

In reply on the oral argument to insinuations by plaintiff's counsel that this tariff had a sinister purpose not in any way disclosed by the record, I relied upon the court's indulgence to answer those insinuations by appealing to the fact made clear by undisputed evidence on the trial of the Osborne case upon the merits that the Nebraska-seaboard rate was made temporarily to meet a

temporary and extraordinary competition to the seaboard via St. Louis. Counsel for the Commission now says in his brief:

"It is possible, however, that the learned counsel may be misinformed as to the real causes of a discrimination which occurred so long ago and which, owing to the inevitable delays of litigation, has come so late to the attention of this court. Suppose that, as intimated by the plaintiff, the Nebraska points were preferred because of relations between Nebraska shippers and railroad officials; such a case is neither unprecedented nor even uncommon."

The best answer to this line of appeal to the highest court in the country will be a reference, which the course of the plaintiff's representatives will justify, to the actual testimony given and not disputed on the Osborne trial. Mr. McCullough, general freight agent of defendant, testified concerning the reasons for making this temporary tariff of 1887 on shipments to the seaboard, as follows:

"In the fall of 1887 the circumstances and conditions in regard to the transportation of corn and oats over the line of the Fremont and Elkhorn, and the Sioux City and Pacific, and the Chicago and North-Western by way of Chicago to the seaboard cities, and the transportation of the same kind of grain by way of St. Louis and Beardstown, were as follows: The printed tariff rates on grain from points in Nebraska to eastern points were the same by way of St. Louis and Beardstown and over the Chicago and North-Western by way of Chicago. If there is no disturbance in the rates and no secret arrangement made, nearly all of the grain on the Fremont and Elkhorn road, as well as a large proportion of the grain on the Union Pacific and other roads in Nebraska, always finds a market over the Chicago and North-Western road by way of Missouri Valley and Chicago. In December, 1887, I found we were not getting any grain from points in Nebraska, and found, on investigating, that for a short time previous to that date between 400 and 500 cars of grain had been shipped from

points on the Fremont road by way of St. Louis and Beardstown. I found that these Nebraska shipments were going by way of St. Louis. I took what information I had, called on the Chicago representatives of the freight departments of the railroads running from Chicago to Boston, New York, Philadelphia and Baltimore, and showed them what I had; found they were fully advised relative to the secret rates being made on this grain by roads around Chicago, and found that they were perfectly willing to join the Fremont and Elkhorn and the North-Western roads in meeting this competition, provided it could be done in a legal manner."

(Osborne Record, page 49.)

The decision of this court in the Import Rate case has shown such considerations as Mr. McCullough describes to be properly, and indeed unavoidably, taken into account. They are not now before this court, and will have to be given a later and other presentation in this litigation if the reasons heretofore found by the inferior courts to be conclusive against plaintiff's claim are not sound. Apology is perhaps due (and if due will be found in the provocation) for answering indefinite and unwarranted charges by plaintiff for which the record offers no basis.

VIII.

THE RELATION OF CONGRESS TO THE LONG AND SHORT HAUL CLAUSE.

It is true that the Commission has long and persistently opposed the rule of the Osborne case, as reiterated by the inferior Federal courts. In the four years and more, however, since the Osborne decision it has perhaps been not improper for the railroads and the public to regard the decisions of the courts heretofore made as having the

greater obligation and weight. The Commission itself, as may be stated without impropriety in view of its reports to Congress, has been the prime mover in the attempts during the last four years to have the fourth section amended so as to conform to the Commission's own contention. It surely is a fact of significence and value that Congress during four years has left the fourth section in practical possession of the meaning given to it by numerous Federal courts notwithstanding the facts that Congress had been officially and repeatedly apprised by report to itself from the Interstate Commerce Commission of the tenor of judicial decisions and had been asked repeatedly and in deference to the desires of the Commission to change the section so as to displace its general judicial interpretation. Even the refusal of a legislative body to adopt amendments to an existing statute which are submitted to it at private instance has weight to show that the legislative body is content to leave the statute with the meaning which the courts have given it; but, beyond that and more important than that, is the further reflection that, so far as any question of expediency or general policy may arise in connection with the long and short haul-clause, such question is purely legislative, and not judicial, and the law is to be changed by Congress, and not by the courts, if at all. So far as the proper interpretation of the long and short-haul clause is involved in the present litigation, the question is exclusively what Congress has heretofore actually enacted, and not what the Commission or others may think it wise to enact. If courts find the meaning of the fourth section to be as they have heretofore declared it, and if Congress should at any time deem it both just and politic to give the clause a scope vastly

and almost indefinitely more comprehensive, Congress can do what the courts cannot do, and can proceed as soon as it will to change the statute in such way as it has already repeatedly been asked with the Commission's sanction to change it, but as it has not heretofore seen fit.

Respectfully submitted.

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